Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CHARLES C. APPRENDI, JR.,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should decline the invitation of the New Jersey Supreme Court to decide whether New Jersey's hate crime law, *N.J.S.A.* 2C:44-3e., unconstitutionally provides for an extended term of imprisonment increasing the maximum possible penalty by ten years, based on proof by a preponderance of the evidence, rather than proof beyond a reasonable doubt, and denies the defendant rights to notice by indictment and trial by jury.

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OPINIONS BELOW

The opinion of the New Jersey Supreme Court is recorded at 159 N.J. 7, 731 A. 2d 485 (1999) and is attached hereto in the Appendix at 1a to 67a. The opinion of the Superior Court of New Jersey, Appellate Division is reported at 304 N.J. Super. 147, 698 A. 2d 1265 (App. Div. 1997) and is attached hereto in Appendix at 68a to 94a. The opinion of Superior Court, Law Division, Judge Rushton Ridgway was oral, not written, and this transcript is attached in the Appendix hereto at 95a to 163a.

JURISDICTION

The petitioner, Charles C. Apprendi, Jr., respectfully prays that a writ of *certiorari* be issued to review the June 24, 1999 judgment and opinion of the Supreme Court of New Jersey affirming the decision of the Superior Court of New Jersey, Appellate Division, affirming his conviction and sentence under a hate crime law, *N.J.S.A.* 2C:44-3e., originally entered by Superior Court of New Jersey, Law Division, Judge Rushton Ridgway.

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amend. XIV, § 1:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

N.J.S.A. 2C:44-3e.:

> . . . [T]he court shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime, other than a violation of N.J.S. 2C:12-1a., N.J.S. 2C:33-4 or a violation of N.J.S. 2C:14-2 or 2C:14-3 if the grounds for the application is purpose to intimidate because of gender, to an extended term if it finds, by a preponderance of the evidence, the grounds in subsection e . . . .
>
> e. The defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.

STATEMENT OF THE CASE

This case raises in the most direct and uncluttered form the constitutional questions discussed, but left unanswered, in *Jones v. United States*, ___U.S.___119 S. Ct. 1215, 143 L.Ed. 2d 311 (1999): the constitutional aspects of the right to a jury determination of critical facts in a criminal case. More precisely, the case asks whether a state legislature can require that a judge decide, by a preponderance of the evidence, a defendant's mental state, which can dramatically increase his maximum sentence, thereby depriving the defendant of his or her Sixth Amendment guarantee of governmental proof beyond a reasonable doubt to a jury. The New Jersey statute in question here, N.J.S.A. 2C:44-3e., expressly gives to the judge, not the jury, to be decided not beyond a reasonable

doubt, but by a preponderance of the evidence, the purpose with which a defendant acted. That factor doubles the variable maximum sentence, from a possible maximum of ten years to a maximum sentence of 20 years. Moreover, that factor is uniquely the kind of question which common law juries have decided for at least the past five centuries, the defendant's mental state and purpose in acting.

The factual setting demonstrates the critical importance of the *Jones* case. The petitioner, Charles Apprendi, was arrested for shooting into his neighbor's house. Mr. Apprendi ultimately pleaded guilty to possession of a firearm for an unlawful purpose, and to unlawful possession of a prohibited weapon, but preserved his right to challenge the constitutionality of the New Jersey statute here involved, contending that it violated the Sixth Amendment to the United States Constitution.

Having reserved that objection, Mr. Apprendi appeared at a plenary hearing, held before the Hon. Rushton Ridgway, to determine his state of mind at the time of the shooting. That hearing, at which Judge Ridgway was to determine the issue by a preponderance of the evidence, began by focusing on the interrogation of the defendant only one hour after the incident.

On December 22, 1994 the petitioner was arrested in his home in Vineland, New Jersey for the shooting of his neighbor's house. The shooting occurred at approximately 2:04 a.m. At approximately 3:05 a.m. on December 22, 1994 defendant confessed to Vineland Police that he had fired approximately four or five rounds from a .22 caliber rifle into the house. After more than three hours

of interrogation on December 22, 1994, at approximately 6:04 a.m., the petitioner again was questioned by the police. No written or recorded oral statement was given by the defendant, but an officer did testify at a plenary hearing before the trial court that Mr. Apprendi " . . . told me he fired shots at the home because there were black people living there." 175a.

The nature and extent of the three-hour interrogation of Mr. Apprendi is significant in two respects. First, the police department had espoused the theory that the shooting of the house was racially motivated long before the petitioner was interrogated. Specifically, there had been previous criminal mischief activities against the residence.

The second reason why the interrogation of the petitioner was significant pertains to the defendant's psychological infirmities, which were explored in a September 5, 1995 plenary hearing, at which time Judge Ridgway heard testimony from Clinical and Forensic Psychologist Gerald Cooke, character witnesses and Defendant Charles Apprendi. Dr. Cooke opined that the motive for the shooting constituted an impulsive destructive disorder brought about when the front door of the house caught his attention because it was purple with a big pane of glass. There was no racially prejudicial intent behind this shooting. 233a-234a.

Dr. Cooke testified that when Mr. Apprendi was interrogated by the police, he was still intoxicated with drugs and alcohol. 211a. Dr. Cooke opined that the petitioner suffers from an obsessive compulsive disorder,

which includes anxiety, gastrointestinal symptoms, kleptomania, loss of control of anger impulses, depression, and drug and alcohol abuse. 216a-217a.

At the plenary hearing Dr. Cooke testified that his clinical examination of the defendant revealed he also suffered from a psychlosymic condition, which is similar to that of a bipolar psychological condition, where "[T]he individual's moods go from being excited and hypomanic and elated to being depressed and lethargic." 217a. On direct examination Dr. Cooke testified that in the fall and winter of 1994 the defendant's psychological disorders and the drug and alcohol produced a synergistic effect, where "[Y]ou've got the combination with an individual who is anxious and over-controlled, but who is disinhibited under the effect of those drugs and alcohol. And you've got an individual who when he becomes emotional also shows interference. So all three factors really combine into fear of judgment and reasoning and impulse control." 218a.

With respect to the police interrogation of Mr. Apprendi, Dr. Cooke testified that:

> Here we have a very anxious man. One who feels very vulnerable. One who feels very inadequate. And one who would say or do just about anything to get out of a frightening anxiety-arousing situation.
>
> Q. Even tell a lie?
>
> A. Tell somebody a lie if it was what he thought that person wanted to hear in order to stop the interrogation and let him out of the situation. . . . I'm only saying that he has the

> kind of personality of an individual who would do that to get out of this kind of situation. 219a.

The purpose of Dr. Cooke's testimony was to reveal to the Court that Defendant Apprendi had psychological infirmities, which contributed significantly to both the shooting incidents and his confession.

After hearing the evidence of the defendant's mental state, Judge Ridgway declared:

> And the Court also takes into consideration that, as I said before, I'm satisfied the defendant has a psychiatric problem. And I'm satisfied, quite frankly, that this racial bias, would not have manifested itself, except for the psychiatric problem that he has. 160a.

This statement makes unclear whether Judge Ridgway would have found the petitioner guilty of the hate crime of possession of a gun had the standard of proof been beyond a reasonable doubt. What is clear, however, is that Judge Ridgway was deciding the issue of the defendant's *mens rea*, informed by testimony on the impact of a psychiatric condition, an issue (and testimony) universally left for juries in determining the culpability of a defendant.

REASONS FOR GRANTING THE WRIT

N.J.S.A. 2C:44-3e. UNCONSTITUTIONALLY ALTERS THE CRIME TO ONE CARRYING AN INCREASED MAXIMUM SENTENCE BASED ON PROOF BY A PREPONDERANCE OF THE EVIDENCE, RATHER THAN PROOF BEYOND A REASONABLE DOUBT, AND DENIES THE DEFENDANT RIGHTS TO NOTICE BY INDICTMENT AND TRIAL BY JURY.

As this Court is well aware, *Jones, supra,* decided some monumental issues regarding the allocation of fact-finding between judge and jury. Nevertheless, the precise constitutional parameters of *Jones* were left unclear because it was unnecessary to resolve that question. The instant case raises two possible interpretations of *Jones,* each of which would be sufficient to decide this case, but each of which would both solidify and clarify the constitutional basis of *Jones*:

1. any fact which increases the maximum sentence of a defendant must be decided by a jury, beyond a reasonable doubt;

2. any fact or judgment, however characterized or labeled, which goes to the defendant's mental state, must be decided by a jury, beyond a reasonable doubt.

Whichever path this Court chooses to resolve the question presented will guide many lower courts, both state and federal, in the numerous cases which are now bubbling to the surface. As Justice O'Hern put it cogently in this very decision: "Any disposition that we make is necessarily tentative in the sense that the final word on this subject will have to come from the United States

Supreme Court." *State of New Jersey v. Charles Apprendi,* 159 N.J. 7, 21, 731 A. 2d 485, 493 (1999) 17a.

> An issue that is surfacing with increasing frequency in criminal cases is whether a given portion of a statute constitutes an element of an offense or, instead, is a sentencing provision. The answer determines whether the factual determinations for which the provision calls are to be made by the fact-finder or the sentencer, and whether the reasonable doubt standard approved must be applied. 67 *U.S.L.W.* 3289, Vol. 67, No. 16 (Nov. 3, 1998)

This petition aptly presents this question for final resolution by the United States Supreme Court. With certain exceptions, the New Jersey hate crime law permits enhanced sentencing in any case in which "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *N.J.S.A.* 2C:44-3e.

We now explore each possibility.

A. This Court should clearly enunciate the principle that any factor which increases a maximum sentence must be determined by a jury, rather than by a judge.

The statute at hand increases the potential maximum sentence available from ten to twenty years. The actual sentence imposed upon Apprendi here was twelve years, two years (20%) in excess of the maximum sentence he could have received had he been convicted and sentenced only for the predicate crimes to which he pled guilty. The

question, therefore, is directly raised whether a factor which affects a maximum sentence must constitutionally be determined by a jury.

Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L.Ed. 2d 350 (1998) stands for the proposition that not every fact expanding a penalty range must be stated in a felony indictment; however, the holding in *Almendarez* was based on recidivisim, which always has been acknowledged as being for the consideration of the sentencing judge, and not an element of an underlying crime, because it is proved simply by reading the defendant's record of prior convictions. That concept has nothing to do with the *Apprendi* case and the extended sentence provision in N.J.S.A. 2C:44-3e., which, again, calls upon the sentencing judge to consider the *mens rea* of the defendant, traditionally an issue for the jury and thus requiring constitutional safeguards.

United States v. Palacios-Casquete, 55 F.3d 557 (11th Cir. 1995) was another recidivisim case, that one involving the deportation of an illegal alien. The Court of Appeals decided that 8 U.S.C. § 1326(b)(2) was a sentencing enhancement subsection, rather than a separate crime. In so finding, the court acknowledged that other Court of Appeals decisions have treated the subsections involved as separate crimes. *See United States v. Campos-Martinez*, 976 F.2d 589 (9th Cir. 1992) and *United States v. Gonzalez-Medina*, 976 F.2d 570 (9th Cir. 1992). Contrary to *Apprendi*, in which the statute requires the sentencing judge to evaluate the state of mind of the defendant in committing the crime, the deportation statute in *Palacios-Casquete* requires the judge merely to review the record of prior convictions.

Specht v. Patterson, 389 U.S. 605, 87 S. Ct. 1209, 18 L.Ed. 2d 326 (1967) was a *habeas corpus* writ involving a petitioner who was convicted for a sex crime, but who was sentenced under a different statute dealing with sex offenders, which brought a much more severe sentence. Justice Douglas, delivering the opinion of the Court, wrote that the sentencing statute " . . . does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. That is a new finding of fact that was not an ingredient of the offence charged." 389 U.S. 605, 608 87 S. Ct. 1209, 1211, 18 L.Ed. 2d 326, 329 (1967).

The Court held that the petitioner was entitled to a full judicial hearing before the magnified sentence could be imposed. The defendant in such a proceeding is entitled to all protections which due process guarantees in state criminal proceedings. "He must be afforded all those safeguards which are fundamental rights and essential to a fair trial . . . ." *Id.* 389 U.S. 605, 609-610, 87 S. Ct. 1209, 1212, 18 L.Ed. 2d 326, 329 (1967).

The semantic debate about whether a statutory fact is an "element of a crime" or a "sentencing factor", which has driven so much of the recent discussion, is, in the end, an empty one. As eloquently articulated by Judge Henry Friendly in *United States v. Kramer*, 289 F.2d 909, 921 (2d Cir. 1961), whatever name is given the factor, when it deeply affects the defendant, it should be resolved by a jury:

> [W]e assume the Sixth Amendment entitles a defendant to have that fact determined by the jury rather than by the sentencing judge. There is, of course, a certain incongruity in asking a jury to exercise such expertise in the ways of the underworld as to determine the "value" of money orders that can be or have been forged; but the omniscience of the jury extends to harder questions than that. *Id.* at 921.

The idea that an increase in maximum sentence "might" activate the Sixth Amendment was hinted at by Mr. Justice Rehnquist in *McMillan v. Pennsylvania*, 477 U.S. 79, 87-88, 106 S. Ct. 2411, 2417, 91 L.Ed. 2d 67 (1986). Although relegated to a side position in *Almandarez-Torres, supra*, its strength was recognized again in *Jones*, and given new life. This Court, through Justice Souter, recognized in *Jones* that:

> . . . [u]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Because our prior cases suggest rather than establish this principle, our concern about the Government's reading of the (carjacking) statute rises only to the level of doubt, not certainty. n.6. *Id.*___U.S.___, 119 S. Ct. 1215, 1224, 143 L.Ed. 2d 311___ (1999).

While this language may be considered dictum, since the Court's ultimate resolution was one of statutory interpretation, it is, at the very least, "well considered" dictum. The present case affords the Court the opportunity to embrace it fully as a constitutional principle. A recent

law review article, written before *Jones*, but having an addendum addressing that decision, has demonstrated the sharp departure which *McMillan* rendered in the sentencing process, and which *Jones* potentially restored. Mark Knoll and Richard Singer, *Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of McMillan v. Pennsylvania*, 29 Seattle U. L. Rev. 1957 (1999). Knoll and Singer rehearse at great length the pre-*McMillan* federal cases, concluding that every federal court had found that any statutorily enunciated fact which increased a maximum sentence, such as the value and amount of goods stolen or possessed, which dramatically increased the sentence, were elements of the crime which had to be proved to the jury.

In *Jones v. United States, supra*, this Court in reviewing a penalty provision in the federal carjacking law, 18 U.S.C. § 2119, which imposed an extended term of imprisonment of not more than 25 years for a carjacking that entails a serious bodily harm to the victim, decided that such a law should not constitute a sentencing enhancer, but rather should be construed as elements of separate crimes for which a defendant must be found guilty by a jury and by proof beyond a reasonable doubt. Justice Souter, writing for the majority, asserted:

> [T]he terms of the carjacking statute illustrate very well what is at stake. If serious bodily injury were merely a sentencing factor under § 2119(2) . . . then death would presumably be nothing more than a sentencing factor under subsection 3 (increasing the penalty range to life). If a potential penalty might rise from fifteen years to life on a non-jury determination, the jury's role would correspondingly shrink

> from the significance usually carried by determinations of guilt to the relative importance of low-level gate keeping. . . . [I]t is therefore no trivial question to ask whether recognizing an unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of the jury's function to a point against which a line must necessarily be drawn." *Id.*, ___U.S.___, 119 S. Ct. 1215, 1224, 143 L.Ed. 2d 311, ___(1999).

Justice Souter noted his discomfort even with this relatively straightforward, objective non-jury determination. By analogy, the New Jersey hate crime law is even more troubling when it delves into the state of mind of a defendant without the benefit of either notice by indictment, trial by jury or proof beyond a reasonable doubt. This is an attempt by the State to erode crucial constitutional rights by merely labeling its law as a sentencing enhancer. This unquestionably is a denial of due process.

Throughout *Jones*, the Court referred to the fact that the factors of serious bodily harm or death severely increased the maximum sentence. Whether referring to the absolute increase (10 years, or an indeterminate number of years) or the relative increase (2/3 or an indeterminate percentage), *Jones* emphasized again and gain that a critical part of its decision was the dramatic impact which the factor visited upon the defendant. The statute in this case has no less dramatic effect: an increase of ten years, as an absolute basis, is exactly the increase which was involved in *Jones*; an increase from 10 years maximum to 20 years maximum, 100%, is more than the percentage increase involved in *Jones*. No matter how calculated, the increase in the maximum sentence in this

case meets any standard of severity which *Jones* might be seen as having adopted.[1]

This case does not require the Court, however, to reach the concerns, expressed by Mr. Justice Breyer in his dissent in *Jones*, that the Sixth Amendment might invalidate any system (such as the federal sentencing guidelines) in which judges' sentencing discretion was limited and dependent upon specific fact finding. The guidelines, after all, do not increase the statutory maximum; they merely restrict judicial discretion by requiring, upon certain factual findings, an increase within the already established statutory range. The commentators are split on whether *Jones* reaches any or all of such guidelines, but they are unanimous that *Jones* does and should be interpreted to reach any scheme by which a maximum sentence is increased. See, e.g., Knoll and Singer, *supra*; Priester, *supra*.

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[1] Two recent articles, Benjamin Priester, *Further Developments on Previous Symposia: Sentenced for a "Crime" the Government Did Not Prove: Jones v. United States and the Constitutional Limitations on Factfinding by Sentencing Factors Rather Than Elements of the Offense*, 61 Law and Contemp. Prob. 249 (1999); and Mark Knoll and Richard Singer, *supra*, have each supported the view that this court should adopt, as a constitutional minimum, the rule that the Sixth Amendment is activated by an increase in the maximum sentence.

B. Any doubt in the *Jones* case about the constitutionality of leaving questions of mens rea to the judge rather than to the jury should be resolved now.

The second possible principle, that any factor going to the mental state of the defendant should be resolved by the jury, is even more obvious. In most instances, it would establish a narrower reading of *Jones* than the first. Yet even such a narrow principle would demonstrate that *Jones* has constitutional teeth.

The statute in question makes the question of defendant's "purpose" to intimidate because of "race, color, gender, handicap, religion, sexual orientation or ethnicity" the relevant factor in determining whether the defendant committed "mere" assault or "hate-purposed assault." The New Jersey Supreme Court, well aware that both the New Jersey Code and a commmon law tradition of five hundred years require juries to determine mental states such as purpose, went to heroic efforts to construe "purpose" as "motive." But the fact remains that, however characterized, the defendant's mental state at the time he committed the offense critically affects his sentence. Determinations of such magnitude, particularly those going to mental culpability, have historically been deemed *"mens rea"* issues, and have historically gone to juries. Indeed, one of the true essences of juries is their ability to assess the real culpability, as measured by *mens rea*, of the defendant. As Judge Wecker declared in dissent in the appellate division in this case:

> Because section e elevates the culpability of the crime based on defendant's purpose, that purpose – **whether it be described as motive or**

> **intent** – must be deemed an element of the more serious crime, and not just a sentencing factor. *State v. Apprendi*, 304 N.J. Super. 147, 163, 698 A. 2d 1265, 1273 (1997) (emphasis added). 71a.

The New Jersey hate crime statute goes even beyond the federal carjacking statute by allowing a trial judge to make a determination of a defendant's state of mind when committing a crime, with the purpose to intimidate a member of a race. This is a subjective determination, which must be delegated to a jury. The carjacking statute entailed an objective determination as to whether or not "serious bodily injury" occurred. A defendant's mental state in committing an offense encompassing a purpose to intimidate because of race requires a finding of fact so integral to the offense that it must be characterized as an element of the offense. In effect, a finding by a trial court that a defendant committed biased crimes pursuant to *N.J.S.A.* 2C:44-3e. causes that defendant's offenses to be graded one degree higher for sentencing purposes: for example, third degree crimes can be sentenced as second degree crimes, second degree crimes sentenced as first degree crimes, and first degree crimes are subject to a sentence between 20 years and life in prison. See *N.J.S.A.* 2C:43-7a. The significantly increased sentencing range requires that the finding of a purpose to intimidate must be treated as a material element of the subject crime, and that material element must be treated with notice by indictment, proof by a preponderance of the evidence of the defendant's state of mind, rather than proof beyond a reasonable doubt, and trial by jury.

Justice Brennan wrote:

> Moreover, use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. . . . *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072-1073, 25 L.Ed. 2d 368, 375 (1970).

Justice Powell wrote:

> [I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment. *Mullaney v. Wilbur*, 421 U.S. 684, 698, 95 S. Ct. 1881, 1889, 44 L.Ed. 2d 508, 517 (1975).

N.J.S.A. 2C:44-3e. specifically requires the judge to become a trier of fact to assess the mental intent of the defendant during the commission of his or her crime. As with other criminal statutes where the trier of fact looks to the purpose behind defendant's crime, or his/her *mens rea*, the standard must be proof beyond a reasonable doubt.

Justice O'Hern held that the hate crime statute does not violate the Due Process Clause of the United States Constitution because it merely is a sentencing enhancer, not an element of a crime, and because of this "label," the burden of proof is not subject to the reasonable doubt

standard. See *State of New Jersey v. Apprendi*, 159 N.J. 7, 26-27, 731 A. 2d 485, 495-496 (1999) 25a-26a. The New Jersey Legislature has violated the Due Process Clause of the United States Constitution by creating an element of a crime to determine whether a defendant acted with the purpose to intimidate a person of color, and merely labeling this element a "sentence enhancer".

Legislation in the past has been struck down for this reason. The landmark case on this subject is *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed. 2d 368 (1970), in which the United States Supreme Court invalidated a New York juvenile delinquency law, even though it had been labeled as a "civil law" rather than a criminal law pertaining to juveniles. *Id.* 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L.Ed. 2d 368, 372 (1970). This case, which is now characterized as the *Winship* Rule, dealt with § 712 of the New York Family Court Act, which defined a juvenile delinquent as " . . . a person over seven and less than sixteen years of age who does an act which, if done by an adult, would constitute a crime." *Id.* 397 U.S. 358, 359, 90 S. Ct. 1068, 1070, 25 L.Ed. 2d 368, 370 (1970).

The New York law had a provision which required a trial judge to determine by an adjudicatory hearing whether a juvenile committed his or her "act" by a preponderance of the evidence. *Ibid.* Justice Brennan, writing for the majority, asserted that our criminal jurisprudence is not merely concerned with guilt or innocence in the abstract, but is also concerned with the degree of criminal culpability and, because of this reason, the Court should not be limited to those facts which constitute a crime as defined by a State law. If it were, a state legislature could undermine the interests of criminal courts under the Due

Process Clause by merely redefining the elements which constitute different crimes and characterizing them as factors which bear solely on the nature and extent of punishment. The so-called "civil label of convenience" which has been attached by the legislature must be construed carefully by the courts. *Id.* 397 U.S. 358, 90 S. Ct. 1068, 1073, 25 L.Ed. 2d 368, 372 (1970). The Court held that " . . . [C]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards in . . . courts, for 'a proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.' " *Id.* 397 U.S. 358, 366-367, 90 S. Ct. 1068, 1073 *citing In re Gault*, 387 U.S. 1, 27, 87 S. Ct. 1428, 1443, 18 L.Ed. 2d 527, ___ (1967).

In the case of Charles Apprendi, Jr. the New Jersey Legislature similarly has undermined the *Winship* Rule, where it has relaxed the standard of proof required by the prosecution to prove that the petitioner committed a crime with the purpose to intimidate a group of individuals because of race by characterizing this crime as a sentence enhancement, rather than as an element of a crime. This is particularly violative of the Due Process Clause of the Constitution in the case *sub judice* because the jurist, acting as the fact-finder, is stepping into the province of a jury, where the judge must determine the mental state and purpose of the defendant by looking at the demeanor of the witnesses, and by evaluating the credibility of each and every lay and expert witness which is, generally speaking, a role for a jury.

The initial concern that legislatures or judges might be attempting to thwart the rule of *Winship* underscores

both the opinions in *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L.Ed. 2d 281 (1977) and *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411, 91 L.Ed. 2d 67 (1986). The New Jersey Supreme Court held in this case that the New Jersey Legislature was not attempting to evade the requirements of *Winship*, and that it was *bona fide* in allowing the court, rather than the jury, to decide motive. The fact is that *Jones* made such a finding irrelevant: while *McMillan* focused on the malevolence or nefariousness of the legislature, *Jones* restored the proper concern: has the legislature, however inadvertently, deprived the defendant of a basic right to jury? On that question, in this case, there can be only one answer.

In *The Burden of Proof in Criminal Cases: A Comment on the Mullaney-Paterson Doctrine*, 55 Notre Dame Law 380, 383 (1980), Professor Fernand N. Dutle examined the degree to which the courts should permit State legislatures to reallocate burdens of proofs by labeling or defining affirmative defenses as opposed to elements of crimes. The professor examined the Supreme Court case of *Mullaney v. Wilbur, supra*, in which the Court considered the issue whether a defendant had the burden of proving an affirmative defense of adequate provocation with respect to a prosecution for criminal homicide. *Mullaney* made it clear that any factor in a criminal case which constituted an element of a crime must be proven by the State beyond a reasonable doubt, but the legislature has some latitude with respect to allocating proof between the State and the defendant on affirmative defenses, and these constitute a gray area, which could be violative of the Due Process Clause of the United States Constitution. Professor Dutle reasons, from a due process

standpoint, there are some issues which must be proved by the State beyond a reasonable doubt, " . . . since the basic idea behind the *Winship* requirement of proof beyond a reasonable doubt is that the State should demonstrate the defendant's blameworthy conduct. . . . " *Id.* at 384.

Professor Dutle states that whatever the linguistic form of the statutory language, any law dealing with a premeditation or deliberation formula with respect to conduct should be proven by the State beyond a reasonable doubt. *Id.* at 384-385. The New Jersey hate crime statute essentially boils down to a premeditation or deliberation law, where the fact-finder must inquire what was the mental state of the defendant when he engaged in his blameworthy conduct. Regardless of the linguistic wording of the statute, whether we are characterizing it as a sentence enhancement or an element of a crime, it really is nothing less than an examination into the purpose for the crime which, under the Due Process Clause, must be proven beyond a reasonable doubt by the State, and must be decided by a jury.

Whatever the precise limits of *McMillan* or *Jones*, the cloud which has overhung judicial and jury power since *McMillan* was dissipated to a substantial degree by both the decision and the opinion in *Jones*. At least so far as this case raises the precise boundaries of that decision, its resolution would promote stability and certainty in hundreds of cases involving scores of statutes in this country. For that reason, the Court should grant the writ, and hear the merits of this case.

CONCLUSION

Based on the foregoing, it respectfully is requested that the decision by the New Jersey Supreme Court be reversed, the New Jersey hate crime law be declared unconstitutional, the twelve-year term of imprisonment on Count 18 be overturned, and this case be remanded to the trial court for a jury trial on the issue of whether there is proof beyond a reasonable doubt that this defendant committed the crime charged because of race.

Respectfully submitted,

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Dated: September 17, 1999

SUPREME COURT OF NEW JERSEY
A-164 September Term 1997

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHARLES APPRENDI, JR.,

Defendant-Appellant.

Argued October 13, 1998 – Decided June 24, 1999

On appeal from the Superior Court, Appellate Division, whose opinion is reported at 304 *N.J. Super.* 147 (1997).

Joseph D. O'Neill argued the cause for appellant (*Mr. O'Neill*, attorney; *Mr. O'Neill* and *Charles I. Coant*, on the brief).

Jacqueline E. Turner, Assistant Deputy Public Defender, argued the cause for *amicus curiae*, Office of the Public Defender (*Ivelisse Torres*, Public Defender, attorney).

Lisa Sarnoff Gochman, Deputy Attorney General, argued the cause for respondent (*Peter Verniero*, Attorney General of New Jersey, attorney).

The opinion of the Court was delivered by

O'HERN, J.

An issue that is surfacing with increasing frequency in criminal cases is whether a given portion of a statute constitutes an element of an offense or, instead, is a sentencing provision. The answer determines whether the factual determinations for which the provision calls are to be made by the fact-finder or the sentencer,

and whether the reasonable doubt standard of proof must be applied.

[67 U.S.L.W. 3289, Vol. 67, No. 16 (Nov. 3, 1998).]

This appeal presents such a question. The case concerns the constitutionality of one provision of New Jersey's hate crime laws. With certain exceptions, the provision allows enhanced sentencing in any case in which "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." N.J.S.A. 2C:44-3(e). (For convenience we may sometimes refer to such a purpose as a "biased purpose.") The constitutional question is whether a jury must find that purpose to have existed beyond a reasonable doubt before a court may impose an extended sentence for a hate crime. We find that the provision has been narrowly tailored to meet First Amendment concerns, and represents a legislative attempt to comply with a constitutional mandate, not a legislative attempt to circumvent due process rights to trial by jury. We affirm the judgment of the Appellate Division upholding defendant's extended sentence for a bias crime.

I

Early on the morning of December 22, 1994, police arrested defendant at his home in Vineland for the shooting of a neighbors' home. The neighbors were a black family living in an all-white neighborhood. This was the fourth time that the neighbors' home had been fired upon. On September 24, 1994, a single bullet pierced their

window, and twice in November 1994, bullets struck the exterior of the home. After the December 22 shooting, one of the neighbors recognized defendant's grey Chevrolet truck driving away. The police were called.

The police arrived approximately twenty minutes later and arrested defendant at his home. Acting on a later-acquired search warrant, police found various weapons at defendant's home, including a .22-caliber rifle, with laser sights and a silencer attached, and an anti-personnel bomb. During the police questioning, defendant admitted that he had fired four or five rifle shots into the home. Defendant gave a later statement in which he admitted that although "he does not know the . . . victims or the family, but because they are black in color he does not want them in the neighborhood. . . . " He said that he was "just giving them a message that they were in his neighborhood."

A Cumberland County grand jury returned a twenty-two-count indictment against defendant. It included charges of possession of a firearm for an unlawful purpose, possession of a prohibited weapon, attempted murder, attempted aggravated assault, harassment, and possession of a destructive device.

Defendant negotiated a plea agreement under which he pled guilty to three of the counts. Two counts included the second-degree crimes of possessing a firearm for an unlawful purpose on September 24 and December 22, 1994. The third involved unlawful possession of a prohibited weapon, an anti-personnel bomb. Under the terms of the plea, any sentence imposed on the prohibited weapon count was to be concurrent with the sentences to be

imposed on the two unlawful purpose counts. The plea agreement left the determination of the sentence on these two counts to the discretion of the court. In addition, the State reserved the right to make an application under the hate crimes law for imposition of an extended sentence on one count of the indictment. Possession of a weapon for an unlawful purpose is a second-degree crime for which the ordinary term is between five and ten years. If approved, an extended term on one of those counts exposed Apprendi to a maximum penalty of twenty years' imprisonment with ten years of parole ineligibility. When the weapon possessed is a firearm, the Graves Act requires the imposition of a minimum term of imprisonment of at least one-third of the sentence imposed or three years, whichever is greater. *N.J.S.A.* 2C:43-6(c). As part of his plea agreement, Apprendi reserved the right to contest the constitutionality of *N.J.S.A.* 2C:44-3(e), the hate-crime sentence enhancer.

At a hearing prior to sentencing, defendant offered the testimony of a psychologist who had evaluated defendant's mental state in order to establish the motive underlying the crimes. The witness shed light on certain psychological abnormalities of defendant. His condition did not rise to a level sufficient to establish a diminished capacity or insanity defense under *N.J.S.A.* 2C:4-1. The psychologist diagnosed defendant as having an obsessive-compulsive disorder, a cyclothymic disorder (a type of temperament alternating moods of elation and depression), kleptomania (a tendency to steal), drug dependence, and alcohol abuse. Additionally, the psychologist concluded that although the defendant knew that he was discharging the weapon toward the house and that it was

wrong to do so, "his judgment and impulse control were substantially impaired at the time of the accident." Following that hearing, the State moved on September 5, 1995 for an extended term of imprisonment pursuant to *N.J.S.A.* 2C:44-3(e). After consideration of the testimony taken at the hearing, the trial court rejected the psychological defense, and concluded that defendant's actions were the product of racial bias thereby satisfying the statute. The court sentenced Apprendi on one of the unlawful-purpose counts to an extended term of twelve years' imprisonment with four years of parole ineligibility. Because this was Apprendi's first offense, the court made the lesser sentences on the other counts concurrent with the extended term. Other fines and penalties were imposed.

On appeal, Apprendi charged that he had been sentenced under an unconstitutionally vague law in that it permitted a court to sentence defendant to an extended term of imprisonment on so vague a basis as that the crime had been committed "at least in part with ill will, hatred or bias toward the victim." He further argued that the statute unconstitutionally allows imposition of an extended term of imprisonment based on proof of the biased purpose by a preponderance of the evidence rather than proof found by a jury beyond a reasonable doubt. A majority of the Appellate Division dismissed the vagueness challenge because in 1995, before the date of Apprendi's sentence, the Legislature had already deleted the words, "at least in part with ill will, hatred or bias toward the victim." 304 *N.J.Super.* 147, 152 (App.Div.1997). The 1995 amendment

excising the words was in response to this Court's decision in *State v. Mortimer*, 135 *N.J.* 517, *cert. denied*, 513 *U.S.* 970, 115 *S. Ct.* 440, 130 *L.Ed.*2d 351 (1994), holding that the same language in *N.J.S.A.* 2C:33-4(d) (a provision of our hate-crime laws addressing harassment), was unconstitutionally vague. The Appellate Division majority found that the use of the preponderance of the evidence standard to mandate an extended term did not violate the constitutional requirement that the State must prove each element of a crime beyond a reasonable doubt. 304 *N.J.Super.* at 153. The panel found that the Legislature had not made racial bias an element of the crime charged because the provision was included in a section of the Criminal Code entitled "authority of court in sentencing." *Ibid.* The majority reasoned that "[a]s to sentencing factors which are not elements of a crime, the State's burden of proof is not subject to the reasonable doubt standard." *Ibid.* It compared this sentencing provision to that of Graves Act sentencing under which the State need not prove beyond a reasonable doubt that the actor possessed a firearm during the commission of a crime as a predicate to the imposition of a Graves Act sentence of mandatory parole ineligibility. *Id.* at 155. One judge dissented. She found that the federal and State constitutions require that a jury decide each element of a crime beyond a reasonable doubt and that the

> "purpose to intimidate . . . because of race, [or] color" is an element of the crime when that purpose raises the sentence for the crime. . . . The State's power to define away the elements of the crime cannot extend, as the majority holds, to defining away the actor's culpable purpose [when it served to enhance his sentencing.]
>
> [Id. at 162.]

Defendant appealed as of right under Rule 2:2-1(a)(2) on the basis of the dissent below.

II

A.

In order to understand this case, it is necessary to understand its background. On May 13, 1991, Steven Vawter and David Kerns spray-painted a Nazi swastika and words that seemed to spell "Hitler rules," on a synagogue in Rumson, New Jersey. On the same day, they spray-painted a satanic legend on the driveway of a nearby Roman Catholic church. The police charged Vawter and Kerns with violations of sections 10 and 11 of New Jersey's hate crime statute. *N.J.S.A.* 2C:33-10 and -11 forbade assaultive intimidation by the use of hateful symbols such as a swastika and the placement of such symbols on places of religious worship.

On August 23, 1991, David Mortimer and two juveniles spray-painted hate-filled words on the garage door of a Pakistani family's home in East Brunswick, New Jersey. Police charged Mortimer with two counts of ethnic harassment under *N.J.S.A.* 2C:33-4(d), which forbade harassment by offensive communications and made the offense a fourth-degree crime if one acted in part with ill will, hatred or bias and with a purpose to intimidate because of race, color, religion, sexual orientation or gender. These two 1991 cases, *Vawter* and *Mortimer*, were the first major challenges to New Jersey's hate crime laws. *State v. Vawter*, 136 *N.J.* 56 (1994); *State v. Mortimer*, 135 *N.J.* 517 (1994), *cert. denied*, 513 *U.S.* 970, 115 *S. Ct.* 440, 130 *L. Ed.* 2d 351 (1994).

States began to enact laws to counter the evil of hate crimes in the 1980s.

> Today nearly every state, using varied approaches, has enacted legislation to punish acts of bias-motivated crime. Some states created new crimes of bias-motivated violence or intimidation. Others created new crimes that consist of the bias-motivated commission of a crime that already exists in [a] statute. Other states provided for enhanced penalties where commission of a crime was motivated by bias, or chose to treat the actor's bias motivation as an aggravating circumstance in sentencing.
>
> [Camilla Nelson, *Hate Crime on the Internet*, 1997 *SPG NAAG Civ. Rts. Update* 1, 2 (1997).]

New Jersey was one of the first states to adopt an anti-hate crime law, *L.* 1981, *c.* 282. In generic terms, the 1981 law outlawed the burning of crosses or placing of swastikas on public or private property with a purpose to terrorize others by threats of violence (Section 10) and outlawed the placing of such graffiti on houses of worship or cemeteries (Section 11).

In 1990, the Legislature expanded the coverage of our hate crime laws by enacting the "Ethnic Intimidation Act," *L.* 1990, *c.* 87. That law (1) made the disorderly persons offense of simple assault a crime of the fourth degree if the actor had a biased purpose in selecting the victim, *N.J.S.A.* 2C:12-1e; (2) made the petty disorderly persons offense of harassment a crime of the fourth degree if the actor had a biased purpose in selecting the victim, *N.J.S.A.* 2C:33-4d; and (3) added a provision allowing an extended term of imprisonment for other

crimes of the first, second or third degree, *N.J.S.A.* 2C:44-3(e).

For convenience, we refer in this opinion to the several provisions of our hate-crime statute as Section 4d, Sections 10 and 11, Section 12e, and Section 44-3(e).

In signing the legislation, Governor Florio stated:

> From now on, the law in New Jersey will be intolerant of ethnic intimidation. Those who commit these crimes of hate are going to face additional charges. From now on, hate crimes will be serious crimes, whether it's a phone call in the middle of the night or vandalism that leaves hateful symbols in its wake or racial slurs.
>
> [Wisam Ali, *Florio extends term for 'crimes of hate'*, *Home News*, Aug. 10, 1990.]

That law was similar to a model hate crime statute recommended by the Anti-Defamation League of B'nai B'rith (ADL). The model was "intended to assist state and local governments which would like to enact hate crime laws." Terry A. Maroney, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 *N.Y.U.L. Rev.* 564, 589 (1998). The ADL recommended that there be "a separate substantive crime for institutional vandalism, [and a] penalty enhancement for crimes motivated by certain biases." *Id.* at 589-90. The model statute provides, in pertinent part, "that a person is guilty of intimidation when he or she violates specified preexisting criminal laws . . . by reason of the actual or perceived race, color, religion, national origin, or sexual orientation of the victim." *Id.* at 589 n. 146.

B.

While *Vawter* and *Mortimer* were pending, two other cases were working their way through the courts of other states. In one case, white teenagers had burned a cross on the fenced-in yard of a black family in St. Paul, Minnesota. *R.A.V. v. City of St. Paul*, 505 *U.S.* 377, 112 *S. Ct.* 2538, 120 *L. Ed.* 2d 305 (1992). Convicted under St. Paul's hate crime ordinance, the youths appealed to the United States Supreme Court. In *R.A.V., supra*, 505 *U.S.* at 384-85, 112 *S. Ct.* at 2543-44, 120 *L. Ed.* 2d at 318-19, the Supreme Court held that when a state regulates unprotected expression (fighting words), it cannot discriminate on the basis of content or viewpoint. Under that rationale, a state may prohibit the expression of fighting words (threats, harassment, etc . . .) but if a state attempts to prohibit only those fighting words that contain racist hate speech, the regulation will be subject to strict scrutiny and may be found to be under-inclusive.

States breathed a collective "sigh of relief" when some of the constitutional concerns regarding hate crime statutes were alleviated by the Court's decision one term later in *Wisconsin v. Mitchell*, 508 *U.S.* 476, 113 *S. Ct.* 2194, 124 *L. Ed.* 2d 436 (1993). George G. Size & Glenn R. Britten, *Is There Hate Speech?: R.A.V. and Mitchell in the Context of First Amendment Jurisprudence*, 21 *Ohio N.U.L. Rev.* 913, 913 (1995). In that case a group of black youths, including Mitchell, pointed out a white boy on the street, beat him until he was unconscious, and then stole his tennis shoes. *Mitchell, supra*, 508 *U.S.* at 480, 113 *S. Ct.* at 2196-97, 124 *L. Ed.* 2d at 442. The Supreme Court in *Mitchell, supra*, held that the First Amendment does not prohibit a state from providing enhanced punishment for

a crime based on the actor's discriminatory purpose in committing the crime. *Id.* at 486, 113 *S. Ct.* at 2200, 124 *L. Ed.* 2d at 445-46 (citing *Dawson v. Delaware*, 503 *U.S.* 159, 165, 112 *S. Ct.* 1093, 1097, 117 *L. Ed.* 2d 309, 317 (1992)). Whereas the invalidated St. Paul ordinance in *R.A.V.* was expressly directed at expression, *Mitchell* explained that "[the sentence enhancer] in this case is aimed at conduct unprotected by the First Amendment." *Id.* at 487, 113 *S. Ct.* at 2201, 124 *L. Ed.* 2d at 447.

It is not perfectly clear however, in what sense the hate crime sentence enhancer upheld in *Mitchell* was directed at conduct, whereas the St. Paul ordinance struck down in *R.A.V.* was directed at speech. Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests*, 29 *U.C. Davis L. Rev.* 553, 560 (1996). Both ordinances appeared to have been "directed at bias-motivated behavior." *Id.* at 560. A more cynical view may be that the Supreme Court "shrugged off" without making a "full retreat" from the position that it had taken in *R.A.V.* Robert R. Riggs, *Punishing the Politically Incorrect Offender Through "Bias Motive" Enhancements: Compelling Necessity or First Amendment Folly?*, 21 *Ohio N.U.L. Rev.* 945, 950 (1995). "Ultimately, stare decisis leaves . . . no alternative but to follow the complex footsteps of *Vawter* and *R.A.V.*" Lorri R. Forter, *The Role of Precedent in Hate Crime Decisions*, 5 *Temp. Pol. & Civ. Rights L. Rev.* 243, 253 (1996).

C.

Consistent with the principles of the two cases, our Court has struck down the features of the New Jersey

hate-crime law that fall within the pattern of *R.A.V.* as being directed at speech or expression. Conversely, our Court has upheld the features of the law that fall within the pattern of *Wisconsin v. Mitchell* as being penalty-enhancers.

In *Vawter,* Vawter and Kerns had been charged under Sections 10 and 11 of the 1981 law. The Court found that those Sections represented content-based restrictions that were unconstitutional because they punished only threats or displays of graffiti expressive of certain beliefs, not all threats. *Vawter, supra,* 136 *N.J.* at 75. The Court concluded that in adopting those sections, the Legislature was "obviously expressing its disagreement with the message conveyed by the conduct that the statutes regulate." *Id.* at 68. The Court "reluctantly" based its decision on the Supreme Court's decision in *R.A.V., supra. Id.* at 70. In his separate opinion in *Vawter,* Justice Stein perceived the flawed logic of *R.A.V.*'s "underbreadth" analysis. *Id.* at 98 (Stein J., concurring). He viewed Sections 10 and 11 as step-by-step legitimate responses to "the most virulent and dangerous formulation of bias-motivated incitements to violence." *Ibid.*

Mortimer, on the other hand, had been charged with one count of harassment under *N.J.S.A.* 2C:33-4d. Distinguishing the harassment provisions in Section 4d from those in Sections 10 and 11, the Court dismissed Mortimer's First Amendment challenge. Justice Clifford explained that the St. Paul ordinance "prohibited the expression of hate," while Section 4d "increases the level of the crime only when a person acts on his or her beliefs and selects the victim with a purpose to intimidate because of one of the specified circumstances – race,

color, religion, sexual orientation, or ethnicity. . . . [Thus,] Section 4 proscribes only the harassing conduct itself." *Mortimer, supra,* 135 *N.J.* at 528. The Court concluded that the statutory language, "at least in part with ill will, hatred or bias toward the victim," was unconstitutionally vague because it failed "to communicate with sufficient clarity what the statute prohibits." *Id.* at 533. In order to avoid the vagueness problem and thus construe the statute constitutionally, the Court excised the vague language from subsection d. *Id.* at 534. Following the decision in *Mortimer,* the Legislature amended *N.J.S.A.* 2C:33-4d and *N.J.S.A.* 2C:44-3(e) to excise the vague language.

Although it is true that in *Wisconsin v. Mitchell,* the jury found that the defendant had intentionally selected his victim based on race, nothing in *Mitchell* or *Mortimer* alerted the Legislature to the concern that the penalty-enhancing provisions of its hate crime law would be unconstitutional because a judge, not a jury, found the biased purpose to intimidate by a preponderance of the evidence. The question is – when does due process require jury findings beyond a reasonable doubt.

III

A.

The Due Process Clause of the Fourteenth Amendment requires that the essential elements of a crime be proven beyond a reasonable doubt. *In Re Winship,* 397 *U.S.* 358, 90 *S. Ct.* 1068, 25 *L. Ed.* 2d 368 (1970). There is, however, no litmus test or unerring "constitutional calculus" for determining what is an essential element of a

crime. *N.J.S.A.* 2C:1-14(h) defines an element of an offense as:

> (1) such conduct or (2)such attendant circumstances or (3)such a result of conduct as
>
> > (a) is included in the description of the forbidden conduct in the definition of the offense;
> >
> > (b) establishes the required kind of culpability;
> >
> > (c) negatives an excuse or justification for such conduct;
> >
> > (d) negatives a defense under the statute of limitations;
> >
> > (e) establishes jurisdiction or venue.

These definitions do not explicitly cover Section 44-3(e).

Mullaney v. Wilbur, 421 *U.S.* 684, 704, 95 *S. Ct.* 1881, 1892, 44 *L. Ed.* 2d 508, 522 (1975), held that under a Maine statute that defined the offense of first-degree murder in terms of the absence of heat of passion, due process required the State to bear the burden on that fact. *Martin v. Ohio*, 480 *U.S.* 228, 234, 107 *S. Ct.* 1098, 1102, 94 *L. Ed.* 2d 267, 274-75 (1987), upheld a law imposing on a defendant the burden of proof of self-defense because the same evidence will often negate the State's case even if insufficient to prove self-defense by a preponderance of the evidence. In *Patterson v. New York*, 432 *U.S.* 197, 220-21, 97 *S. Ct.* 2319, 2332, 53 *L. Ed.* 2d 281, 298 (1977), because New York established the penalty for second-degree manslaughter on the basis of mitigation premised upon a finding of 'extreme emotional disturbance,' the Court permitted New York to impose on the defendant

the burden of proving that factor. *McMillan v. Pennsylvania*, 477 *U.S.* 79, 106 *S. Ct.* 2411, 91 *L. Ed.* 2d 67 (1986), upheld a Pennsylvania statute that contained a sentencing factor – "visible possession of a firearm" – the presence of which required the judge to impose a minimum prison term of five years. The Court held that the Constitution did not require Pennsylvania to treat the factor as an element of the crime. *Id.* at 91, 106 *S. Ct.* at 2419, 91 *L. Ed.* 2d at 79. In so holding, the *McMillan* Court said that the State's "link[ing] the 'severity of punishment' to 'the presence or absence of an identified fact' " did not automatically make that fact an "element." *Id.* at 84, 106 *S. Ct.* at 2415, 91 *L. Ed.* 2d at 294 (quoting *Patterson, supra*, 432 *U.S.* at 214, 97 *S. Ct.* at 2329, 53 *L. Ed.* 2d at 294). Citing *Patterson*, the Supreme Court said that "the state legislature's definition of the elements of the offense is usually dispositive." *Id.* at 85, 106 *S. Ct.* at 2415, 91 *L. Ed.* 2d at 75. It said that it would not "define precisely the constitutional limits" of a legislature's power to define the elements of an offense. *Id.* at 86, 106 *S. Ct.* at 2416, 91 *L. Ed.* 2d at 76. Finally, the Supreme Court held that, whatever those limits might be, the State had not exceeded them. *Ibid.*

The primary concern of the Supreme Court in this series of cases has been whether "states would *circumvent due process* by redefining the essential elements of guilt as affirmative defenses or as sentencing factors." *State v. Krantz*, 788 *P.*2d 298, 304 (1990) (emphasis added), *cert. denied.*, 498 *U.S.* 938, 111 *S. Ct.* 341, 112 *L. Ed.* 2d 306 (1990). Because the Supreme Court has declined to "define precisely the constitutional limits" on the states' ability to define elements of an offense, *McMillan, supra,*

477 *U.S.* at 86, 106 *S. Ct.* at 2416, 91 *L. Ed.* 2d at 76, we must attempt to determine what those limits are.

B.

We begin by stating the obvious. Merely because the Legislature has placed the hate-crimes enhancer within the sentencing provisions of the Code of Criminal Justice does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense. Were that the case, the Legislature could just as easily allow judges, not juries, to determine if a kidnaping victim has been released unharmed. *See State v. Federico*, 103 *N.J.* 169 (1986) (requiring State, in order to establish first-degree kidnaping offense, to prove beyond a reasonable doubt that victim was not released unharmed).[1]

Second, the constitutional question may not be avoided by characterizing a biased "purpose to intimidate" as a "motive". Of course it is true that motive is not an essential element of a crime. But in ordinary circumstances proof of motive does not increase the penal consequences to an actor. Whether one kills out of jealousy or for pecuniary gain does not increase the non-capital sentence for the crime. Whether one steals to put bread on a table or to feed a drug habit does not increase the sentence for theft. A finding under Section 2C:44-3(e) of a

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[1] Federal courts have split on the extent to which a punishment scheme may be viewed as a sentence enhancement provision before it amounts to the definition of a new crime. *Compare United States v. Stone*, 139 F.3d 822 (11th Cir.1998), *with United States v. Palacios-Casquete*, 55 F.3d 577 (11th Cir.1995), *cert. denied*, 516 *U.S.* 1120, 116 *S. Ct.* 927, 33 *L. Ed.* 2d 855 (1996).

"motive" to intimidate because of the victim's race or ethnicity has vastly different consequences than in regular criminal proceedings. Labels do not afford an acceptable answer. Indeed, the exclusion of the words "at least in part with ill will, hatred or bias toward the victim" limits our ability to view this finding as merely a search for motive. We must search for firmer principles of decision.

Our existing precedent does not control the disposition of this case. Although *Mortimer, supra*, assumed in the prosecution of a Section 4 harassment offense that evidence of a biased purpose would be "introduce[d] . . . at trial" as part of the "required state of mind or *mens rea*" under the statute, 135 *N.J.* at 531, 534, the Court did not address the Section 43 sentence enhancer. Similarly, *State v. Camacho*, 153 *N.J.* 54, 56-57 (1998), posed the question for resolution in the case as "whether intent to use a firearm against the person, as opposed to the property, of another is an element" of possession of a weapon for an unlawful purpose entitling a defendant to a jury trial on that issue or was instead a sentencing factor for the court. *Camacho* did not explore the underlying question of the constitutional limits on allocating sentencing factors to a judge or jury.

C.

Any disposition that we make is necessarily tentative in the sense that the final word on this subject will have to come from the United States Supreme Court. The recently enacted amendments to the federal sentencing

guidelines now include a hate crime penalty enhancement provision that applies to all federal crimes. *See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. N.* 103-322, § 280003 (1994), 108 *Stat.* 2096; 28 *U.S.C.A.* § 994. Effective November 1, 1995, federal sentencing guidelines provide that the defendant's offense level is to be increased by three levels

> [i]f the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person. . . .
>
> [18 U.S.C.A. § 3A1.1.]

Although the federal hate crimes law requires the jury to resolve the issue of biased purpose as part of any trial, the law allows, in the same circumstances as of this case, a judge to determine beyond a reasonable doubt that the defendant intentionally selected the victim because of the race, creed, or other characteristic of the victim. Eventually then the United States Supreme Court will have to resolve the issue that we face in this case. For now, we must examine its existing precedent to determine the proper disposition.

In its most recent treatment of the subject, *Jones v. United States*, ___ *U.S.* ___, 119 *S. Ct.* 1215, 1222, ___ *L. Ed.* 2d ___ (Mar. 24, 1999), the Court, in order to avoid an

interpretation that would pose "grave and doubtful constitutional questions," held as a matter of statutory construction, not constitutional requirement, that provisions of the federal carjacking statute that established higher penalties to be imposed when the offense results in serious bodily injury or death constituted additional essential elements of the offense. As essential elements of an offense, these factual matters must be decided beyond a reasonable doubt by a jury, not a judge. *In re Winship, supra*, 397 *U.S.* 358, 90 *S. Ct.* 1068, 25 *L. Ed.* 2d 368. In the course of its opinion in Jones, the Court stated that

> under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Because our prior cases suggest rather than establish this principle, our concern about the Government's reading of the [carjacking] statute rises only to the level of doubt, not certainty.
>
> [*Jones, supra*, ___ *U.S.* ___ n.6, 119 *S. Ct.* at ___, ___ *L. Ed.* 2d ___ n.6.]

The five members of the majority in *Jones* included one member who had joined a different formulation in the Supreme Court's 1998 opinion, *Almendarez-Torres v. United States*, 523 *U.S.* 224, 118 *S. Ct.* 1219, 140 *L. Ed.* 2d 350 (1998).

Because the language in *Jones* was not essential to its holding, and because the Court did not expressly overrule the *Almendarez-Torres* formulation, we believe that

case still states the rationale that we must apply here.[2] In *Almendarez-Torres*, the Court upheld a statute that treats an alien's earlier illegal entry as a sentencing factor upon a subsequent conviction of illegal re-entry, rather than as an element of that offense. *Id.* at ___, 118 *S. Ct.* at 1233, 140 *L. Ed.* 2d at ___. The Court explained, "to hold that the Constitution requires that recidivism be deemed an 'element' of [an] offense would mark an abrupt departure from a longstanding tradition of treating recidivism as 'going to the punishment only.' " *Id.* at ___, 118 *S. Ct.* at 1231, 140 *L. Ed.* 2d at ___ (quoting *Graham v. West Virginia*, 224 *U.S.* 616, 629, 32 *S. Ct.* 583, 587-88 (1912)). Rather than to reinvent the analysis, we will simply restate it in full:

> In assessing petitioner's claim [that a jury not a judge would have to establish beyond a reasonable doubt that Almendarez had previously entered the country illegally], we have examined McMillan to determine the various features of the case upon which the Court's conclusion arguably turned. The McMillan Court pointed out: (1) that the statute plainly "does not transgress the limits expressly set out in Patterson," id., at 86, 106 S. Ct., at 2416; (2) that the defendant (unlike Mullaney's defendant) did not face " 'a differential in sentencing ranging from a nominal fine to a mandatory life sentence,' " 477 U.S., at 87, 106 S. Ct., at 2417 (quoting Mullaney, 421 U.S., at 700, 95 S. Ct., at 1890); (3) that the statute did not "alte[r] the maximum penalty for

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[2] We acknowledge that the Jones Court specifically excepted recidivism or prior convictions from its general statement of the law concerning sentence enhancers, and therefore had no occasion to overrule *Almendarez-Torres*. *Jones, supra*, ___ *U.S.* ___, 119 *S. Ct.* at 1227, ___ *L. Ed.* 2d ___.

> the crime" but "operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it," 477 U.S., at 87-88, 106 S. Ct., at 2417; (4) that the statute did not "creat[e] a separate offense calling for a separate penalty," id., at 88, 106 S. Ct., at 2417; and (5) that the statute gave "no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense," but, to the contrary, "simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given that factor," id., at 88, 89-90, 106 S. Ct., at 2417, 2418.
>
> [*Id.* at ___, 118 *S. Ct.* at 1230, 140 *L. Ed.* 2d at ___.]

With but one exception, that the Section 44-3(e) finding does "alter the maximum penalty for the crime," the hate-crimes enhancer resembles *McMillan* in respect of all of the other factors. The statute plainly does not transgress the limits set out in *Patterson* that due process of law does not allow the state to shift the burden of proof by presuming a necessary ingredient upon proof of the other elements of the offense, 432 *U.S.* at 215, 97 *S. Ct.* at 2329-30, 44 *L. Ed.* 2d at 295 (1975); the differential in sentencing is not between a nominal fine and mandatory life sentence; the statute does not create a separate offense calling for a separate penalty; the statute gives no impression of having been tailored to permit the bias finding to be a "tail that wags the dog of the substantive offense." There is simply no indication that the Legislature restructured its criminal code and sentencing structures in an attempt to "evade" the commands of *Winship*,

supra, a dominant theme underlying the Court's decision in *Mullaney*, *supra*, 421 *U.S.* at 698, 95 *S. Ct.* at 1889, 44 *L. Ed.* 2d at 519; *see Adamson v. Ricketts*, 865 *F.2d* 1011 (9th Cir. 1988) *cert. denied*, 497 *U.S.* 1031, 110 *S. Ct.* 3287, 111 *L. Ed.* 2d 795 (1990)(invalidating Arizona's death sentencing provisions in part because it *withdrew* from its substantive criminal law various elements traditionally reserved for jury determination and reclassified them as sentencing factors).

On the contrary, the Legislature simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor. A finding of a biased motive or purpose to intimidate, like the factor of recidivism in the *Almendarez-Torres* analysis, is a very traditional sentencing factor. *N.J.S.A.* 2C:44-1(2) has long allowed sentencers to take into account the gravity of the harm inflicted on the victim.

Altering the maximum penalty in and of itself has been held not to change the constitutional calculus. In *State v. Krantz*, *supra*, 788 *P.*2d at 303, the Montana Supreme Court found that its "weapon enhancement" sentencing statute did not offend due process even though the determination of weapon usage "could lead to a punishment beyond the maximum provided for the underlying crime." It reasoned that the Montana weapon enhancement statute does not create a separate crime or element of a crime. In another sense, a discretionary sentence enhancer may not have as drastic a penal consequence as a mandatory sentence without possibility of parole.

We agree with the concurring member of the Appellate Division that, like our Graves Act decisions, this decision will pose no threat to constitutional liberties. Almost invariably there is no real doubt about the factual issue that determines the sentencing decision. In *State v. White*, 98 *N.J.* 122 (1984), the underlying conviction of robbery in the first degree was based on the presence of a firearm. The legal issue was whether an accomplice who did not actually possess the weapon could be sentenced to a Graves Act sentence. In *State v. Stewart*, 96 *N.J.* 596 (1984), the defendant admitted that there were firearms in the truck that he was using at the time of the robbery, but contended that such constructive possession, as opposed to use, did not warrant a Graves Act sentence. In like fashion, we believe that in cases like *Vawter* (had the defendants been charged other than under Sections 10 & 11) and *Mortimer*, there is rarely any doubt whether the defendants committed the crimes with the purpose of intimidating the victim on the basis of race or ethnicity. In addition, enhanced sentencing under Section 44-3(e) is limited to cases in which there is said to be a "compelling State interest" to vindicate constitutional rights to be free of invidious discrimination. *People v. MacKenzie*, 40 *Cal. Rptr.* 2d 793, 800-01 (Ct. App. 1995) (citing *Mitchell*, *supra*, 508 *U.S.* at 488, 113 *S. Ct.* at 2201, 124 *L. Ed.* 2d at 447).

Amicus Public Defender has prudently argued that the Court should hesitate to endorse this sentencing scheme because the concept (removing the elements of a crime from its substantive definition and including them in the sentencing provisions of the Code) could undermine traditional rights to trial by jury and the due process of law. There should be no mistake that the Court

would not permit the Legislature (even were it so inclined) to remove traditional *mens rea* or grading factors (such as the absence of passion/provocation in a murder) from the substantive definition of a crime to be determined by a jury and reallocate them for determination by a judge as part of the sentencing process. *See State v. Smith*, 279 *N.J. Super.* 131 (App. Div. 1995) (holding grading provisions based on age of kidnaping victim are elements of offense). The issue posed in this case is all but idiosyncratic owing to the constitutional concerns about punishing thought itself.

We acknowledge that Florida has interpreted its similarly-worded statute to require a jury to find as a predicate to sentencing that the crime was bias motivated. *State v. Stalder*, 630 *So.*2d 1072 (Fla. 1994). We believe that resolution poses as many problems as it solves. To allow generally in criminal trials proof of the biases of the accused creates an added risk of prejudice for defendants. It would open trials to evidence of former acts of bias on the part of the actor. *Ayers v. State*, 645 *A.*2d 157 (Md. 1994) *cert. denied*, 513 *U.S.* 1130, 115 *S. Ct.* 942, 130 *L. Ed.* 2d 886 (1995); *but see Mortimer, supra*, 135 *N.J.* at 538 (cautioning that as condition of admission of other acts of bias, the nexus between incidents must be strong). It would inject into the trial of cases issues of racial or ethnic bias that have a potential to inflame a jury. *State v. Crumb*, 277 *N.J. Super.* 311, 321 (App. Div. 1994), *certif. denied.*, 153 *N.J.* 215 (1998). In *Crumb, supra*, because "the bias count . . . may, if tried with the other counts, skew decisions regarding admission of evidence," the court severed the bias count from the trial. *Ibid.* In *State v. Carter*, 91 *N.J.* 86 (1982), the Court narrowly affirmed the

murder conviction of defendants, holding that the admission of evidence tending to show that their actions were motivated by racial revenge was not so prejudicial as to outweigh its probative value.

IV

To sum up, as the dissent observes, *post* at ___ (slip op. at 37), a statutory argument can be made that the actor's biased purpose to intimidate establishes a required kind of culpability, an element of the offense that must be determined by the jury. However, the biased purpose is not an element of the weapons possession charge. It sufficed to establish that offense that defendant intended to shoot at the victim's home, an unlawful purpose in itself. The more significant problem with defendant's statutory argument is that the Legislature has expressly provided otherwise. The question then is not statutory but constitutional. The reasons that impelled the Legislature to provide that the actor's biased purpose be treated as a sentencing factor are not constitutionally suspect. There is a subtle interplay of constitutional values involved – a First Amendment concern expressed in *R.A.V.* that society not punish thought itself, even hateful thoughts, and a compelling state interest to vindicate the rights of citizens to be free of invidious discrimination. *Wisconsin v. Mitchell, supra*, 508 *U.S.* at 487, 113 *S. Ct.* at 2201, 124 *L. Ed.* 2d at 447.

"To declare a statute unconstitutional is a judicial power to be delicately exercised." *Harvey v. Essex County Bd. of Freeholders*, 30 *N.J.* 381, 388 (1959). "[A] legislative act [should] not be declared void unless its repugnancy to

the constitution is clear beyond reasonable doubt." *Gangemi v. Berry*, 25 *N.J.* 1, 10 (1957). The claim that the statute here conflicts with a constitutional right is far from clear beyond a reasonable doubt. On balance, we find that in this case the "constitutional calculus" of *McMillan* sustains the statutory scheme. The hate-crime enhancer obviously requires a delicate balance of constitutional rights. We do not punish thought. We do punish more severely crimes involving particularly vulnerable victims.[3] We are certain that the law will not be abused. The requirements of the act are strict. It is not enough to show that during the commission of a crime the actor may have exhibited bias. The question is whether the purpose of the crime was to exhibit bias. In *State v. Dobbins*, 605 *So.*2d 922 (Fla. Dist. Ct. App. 1992), *aff'd*, 631 *So.*2d 303 (Fla. 1994), the court found that evidence of the defendant's racial bias against people of the Jewish faith was not enough to invoke a sentence enhancement; rather, the jury must find that the defendant intentionally chose the victim, and committed the crime because of the racial motivation. *Id.*

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[3] "[T]here may be an exception to the general rule that the preponderance standard satisfies due process when a sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction." *United States v. Restrepo*, 946 *F.*2d 654, 659 (9th Cir. 1991), *cert. denied*, 503 *U.S.* 961, 112 *S. Ct.* 1564, 118 *L. Ed.* 2d 211 (1992) (citation omitted). We need not decide today whether the enhancement of a ten-to-twenty year first-degree offense to life imprisonment under *N.J.S.A.* 2C:44-3(e) would offend due process. If a defendant has committed a first-degree crime and selected a victim for reasons of bias, the law provides ample remedies. *See State v. Crumb*, 307 *N.J. Super.* 204 (App. Div. 1997), *certif. denied*, 153 *N.J.* 215 (1998) (imposing sentence of life with a thirty-year parole ineligibility period for biased killing).

at 923; *see also Abbott v. State*, 705 *So.*2d 923 (1997) (explaining that it is insufficient to exhibit bias in the course of committing crime; rather actor must intentionally select victim because of victim's race, creed, color or ethnicity). The use of the term "because of" in a hate-crime statute "connotes a causal link between the infliction of injury and bias motivation. . . . " *Martinez v. State*, 980 *S.W.*2d 662, 667 (Tex. Ct. App. 1998 pet. ref'd).

There is one troubling aspect to this case. The trial court did not articulate the current statutory standard in sentencing. At the time of sentencing, although counsel was aware of the *Mortimer* decision, court and counsel were seemingly unaware of the then recent amendment to Section 44-3(e) that had excised, on the basis of *Mortimer*, the offending language concerning one having acted "at least in part" with ethnic bias or ill will in committing the crime. Although the issue of the court's articulation of the sentence is not before us on the basis of the dissent below, we are satisfied that no court could but conclude that the actor's purpose was, in fact, to intimidate the victims because of their color. The only question before the trial court was whether defendant's mental state, subjected to alcoholism, was such that he could not form the biased purpose. The trial court's review of the evidence submitted by defendant adequately disposed of that issue. There is no real question as to this actor's purpose in shooting into his neighbors' home.

In addition, we believe the sentence imposed was fair and just. Defendant was exposed to three charges of attempted murder and three charges of attempted aggravated assault with a weapon. If convicted of all counts he could have faced life in prison. His plea bargain exposed

him to a sentence of thirty-five years with a twelve-year ineligibility period. (Although the plea form recites a maximum of ten years on each weapon count, it was understood that one of these sentences could be enhanced.) Had unenhanced sentences on the two separate unlawful possession of weapons offenses been made consecutive, defendant would have been exposed to twenty years' imprisonment with six years of parole ineligibility. The sentence imposed was twelve years' imprisonment with four years of parole ineligibility. A satisfactory plea bargain afforded a fair and just resolution of the matter to the State and to defendant. We would not disturb the sentence in this case.

The judgment of the Appellate Division is affirmed.

CHIEF JUSTICE PORITZ and JUSTICES POLLOCK, GARIBALDI, and COLEMAN join in JUSTICE O'HERN's opinion. JUSTICE STEIN has filed a separate dissenting opinion, in which JUSTICE HANDLER joins.

SUPREME COURT OF NEW JERSEY
A-164 September Term 1997

STATE OF NEW JERSEY,

Plaintiff-Plaintiff [sic],

v.

CHARLES APPRENDI, JR.,

Defendant-Appellant.

STEIN, J., dissenting.

In *In re Winship*, 397 *U.S.* 358, 364, 90 *S. Ct.* 1068, 1073, 25 *L. Ed.* 2d 375 (1970), the United States Supreme Court explicitly held that "the Due Process Clause protects the accused [in a criminal proceeding] against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." This appeal requires this Court to apply the holding of *In re Winship* for the first time to one of the sentencing enhancement provisions of the Code of Criminal Justice, *N.J.S.A.* 2C:1-1 to 104-9, and to determine whether the Due Process Clause permits a judge, rather than a jury, to decide by a preponderance-of-the-evidence standard whether the sentencing enhancement factor has been proved.

The Court today affirms the judgment of the Appellate Division sustaining the constitutionality of *N.J.S.A.* 2C:44-3(e), pursuant to which the trial court is authorized to determine by a preponderance of the evidence that the Appellate Division defendant in committing the crimes with which he is charged acted "with a purpose to intimidate an individual or . . . individuals because of race,

color, gender, handicap, religion, sexual orientation or ethnicity." Based on that determination, the statute authorizes the court to sentence the defendant to an extended term of imprisonment. In effect, a trial court's finding that a defendant committed bias crimes pursuant to *N.J.S.A.* 2C:44-3(e) causes that defendant's offenses to be graded one degree higher for sentencing purposes: third-degree crimes are sentenced as second-degree crimes, second-degree crimes are sentenced as first-degree crimes, and first-degree crimes are subject to a sentence between twenty years' and life imprisonment. See *N.J.S.A.* 2C:43-7(a).

In my view, the critical determination required by the statute, that a defendant's mental state in committing the subject offense encompassed a purpose to intimidate because of race, necessarily involves a finding so integral to the charged offense that it must be characterized as an element thereof. Moreover, the significantly increased sentencing range triggered by that statute also persuades me that the finding of a purpose to intimidate must be treated as a material element of a defendant's crimes, and that the material element must be found by a jury beyond a reasonable doubt. Accordingly, I conclude that *N.J.S.A.* 2C:44-3(e) is unconstitutional because it permits the finding of a purpose to intimidate based on race to be made by a judge under a preponderance-of-the-evidence standard.

I

Defendant pled guilty to two counts of a twenty-two count indictment charging him with the second-degree

offense of possession of a firearm for the purpose of using it unlawfully on September 24 and December 22, 1994, *N.J.S.A.* 2C:39-4(a), and to one count charging him with the third-degree offense of knowing possession of a destructive device (an anti-personnel bomb), *N.J.S.A.* 2C:39-3(a). Defendant's plea was conditioned on the right to appeal his sentence. The State moved to have defendant sentenced to an extended term pursuant to *N.J.S.A.* 2C:44-3 which at the time of defendant's offenses provided:

> The court shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime, . . . to an extended term if it finds, by a preponderance of the evidence, the grounds in subsection e. . . .
>
> e. The defendant in committing the crime acted, at least in part, with ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity.
>
> [*Ibid. But see L.* 1995, *c.* 211, § 3, eff. Aug. 14, 1995 (amending text of statute to delete phrase "at least in part, with ill will, hatred or bias toward, and").]

The facts giving rise to defendant's indictment indicated that on September 24 and December 22, 1994, defendant fired shots into a home in his neighborhood in Vineland that was occupied by an African-American family. The September incident involved a single bullet shot through the window of a bedroom in which a nine-year-old child slept. On December 22, 1994, defendant fired eight rounds from a rifle through the front door of the

home. Because defendant's truck was observed driving away from the victims' house immediately after the shooting in December, police officers proceeded to defendant's home and took him into custody. After *Miranda* warnings were administered, defendant allegedly told police that he shot at the house because African-Americans lived there, stating that "he knew that there were black people who lived at that residence because he's seen them out in the yard. And he was giving them a message that they were in his neighborhood."

At his plea hearing defendant admitted that he shot at the victims' home on September 24, 1994 and December 22, 1994, and that he did so "for an unlawful purpose." He retracted that admission during the hearing conducted to determine whether he was subject to an extended term because he committed the crimes while acting with bias and to intimidate the victims because of their race. *N.J.S.A.* 2C:44-3(e). He denied knowing that an African-American family lived in the home and denied shooting at the home on the two occasions charged in the indictment. At the hearing character witnesses testified that defendant did not have a reputation in the community for being biased against African-Americans.

The court found that defendant committed the offenses while acting with bias and a purpose to intimidate the victims because of their race. The court sentenced defendant to twelve years' imprisonment with four years' parole ineligibility on one of the counts of possession of a firearm for an unlawful purpose, and to a seven-year term with three years' parole ineligibility on the other charge of possession of a firearm for an unlawful purpose. On the charge of possession of an anti-

personnel bomb, defendant was sentenced to three years' imprisonment. All sentences were concurrent. The court observed that defendant's sentence to less than the presumptive term for first-degree crimes was based on testimony indicating that he suffered from psychological problems and that his unlawful behavior was aberrational.

A divided panel of the Appellate Division upheld the constitutionality of *N.J.S.A.* 2C:44-3(e) and affirmed defendant's sentence. 304 *N.J. Super.* 147 (1997). Judge Wecker dissented, concluding that the statute was unconstitutional because it deprived defendant of a jury determination beyond a reasonable doubt on whether defendant had committed the charged offenses with a purpose to intimidate the victims because of their race. *Id.* at 161-67. Defendant appeals to this Court as of right. *R.* 2:2-1(a)(2).

II

Not only is the due process issue before us one of first impression for this Court, but its resolution is neither dictated nor clearly forecast by the handful of United States Supreme Court precedents that bear on the question.

The landmark decision is *In re Winship, supra,* in which the Supreme Court reviewed a delinquency determination by a New York Family Court judge who found that appellant, then a twelve-year-old boy, had stolen $112 from a woman's pocketbook. Acknowledging that the evidence might not establish guilt beyond a reasonable doubt, the court rejected the appellant's contention

that that standard of proof was mandated by the Fourteenth Amendment, and relied instead on a provision of the New York Family Court Act that authorized delinquency determinations to be based on a preponderance of the evidence. At a dispositional hearing appellant was placed in a training school for eighteen months, subject to annual extensions until his eighteenth birthday. *In re Winship, supra*, 397 *U.S.* at 359-60, 90 *S. Ct.* at 1070, 25 *L. Ed.* 2d at 372-73.

In an opinion by Justice Brennan, the Supreme Court took note of the longstanding common-law principle that required proof beyond a reasonable doubt to establish guilt of criminal charges:

> The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The "demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt." C. McCormick, *Evidence* § 321, pp. 681-82 (1954). Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does "reflect a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 *U.S.* 145, 155, 20 *L. Ed.* 2d 491, 499, 88 *S. Ct.* 1444 (1968).

> [*Id.* at 361-62, 90 *S. Ct.* at 1071, 25 *L. Ed.* 2d at 373-74 (alteration in original) (citation omitted).]

The Court also emphasized the practical and moral justifications for the requirement of proof beyond a reasonable doubt in criminal trials, holding expressly for the first time that that standard of proof was mandated by the Due Process Clause:

> "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value – as a criminal defendant his liberty – this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt." [quoting *Speiser v. Randall*, 357 *U.S.* 513, 525-26, 78 *S. Ct.* 1332, 1342, 2 *L. Ed.* 2d 1460, 1472-73 (1958).]. . . .
>
> Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. . . .
>
> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of

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every fact necessary to constitute the crime with which he is charged.

> [*Id.* at 364, 90 *S. Ct.* at 1072-73, 25 *L. Ed.* 2d at 375.]

Reversing the New York Court of Appeals, the Supreme Court invalidated the New York statute permitting delinquency determinations to be based merely on a preponderance of the evidence. The Court stated:

> In sum, the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault* – notice of charges, right to counsel, the rights of confrontation and examination, and the privilege against self-incrimination. We therefore hold, in agreement with Chief Judge Fuld in dissent in the Court of Appeals, "that, where a 12-year-old child is charged with an act of stealing which renders him liable to confinement for as long as six years, then, as a matter of due process . . . the case against him must be proved beyond a reasonable doubt." 24 *N.Y.* 2d at 207, 299 *N.Y.S.* 2d at 423, 247 *N.E.* 2d at 260.
>
> [*Id.* at 368, 90 *S. Ct.* at 1075, 25 *L. Ed.* 2d at 377-78.]

The Supreme Court first had occasion to apply the *Winship* principle in *Mullaney v. Wilbur*, 421 *U.S.* 684, 95 *S. Ct.* 1881, 44 *L. Ed.* 2d 508 (1975), a case in which the defendant's trial and conviction of murder in Maine occurred approximately four years prior to the *Winship* decision. At that trial the defendant did not contest his responsibility for the homicide, but alleged that he had

acted in a frenzy provoked by the victim's homosexual advance. On that basis his counsel asserted that at most the homicide was manslaughter, having been committed in the heat of passion provoked by the victim's advances. The trial court instructed the jury that under Maine law murder and manslaughter are both subsets of homicide, and both offenses require the State to prove that the homicide was intentional and unjustifiable. The court further charged that malice aforethought, an essential element of murder, was to be conclusively implied unless the defendant proved by a preponderance of the evidence that he acted in the heat of passion on sudden provocation. After requesting reinstruction on the doctrine of implied malice aforethought and on the meaning of "heat of passion," the jury convicted the defendant of murder. The Maine Supreme Judicial Court affirmed, *State v. Wilbur*, 278 A.2d 139 (1971), rejecting the contention that requiring defendant to prove that he acted in the heat of passion to overcome the presumption of malice aforethought was contrary to the due process protection afforded by *Winship*. *Mullaney, supra*, 421 *U.S.* at 687-88, 95 *S. Ct.* at 1883-84, 44 *L. Ed.* 2d at 513.

In an opinion by Justice Powell, the Supreme Court acknowledged that at common law the burden of proving heat of passion on sudden provocation was borne by the defendant, but noted that that approach had since been rejected by the Court, *Davis v. United States*, 160 *U.S.* 469, 16 *S. Ct.* 353, 40 *L. Ed.* 499 (1895), and by the majority of states. *Mullaney, supra*, 421 *U.S.* at 696, 95 *S. Ct.* at 1888, 44 *L. Ed.* 2d at 517-18. The Court also rejected Maine's contention that the holding of *Winship* applied only to the elements of a crime as defined by state law:

Moreover, if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment. An extreme example of this approach can be fashioned from the law challenged in this case. Maine divides the single generic offense of felonious homicide into three distinct punishment categories – murder, voluntary manslaughter, and involuntary manslaughter. Only the first two of these categories require that the homicidal act either be intentional or the result of criminally reckless conduct. But under Maine law these facts of intent are not general elements of the crime of felonious homicide. Instead, they bear only on the appropriate punishment category. Thus, if petitioners' argument were accepted, Maine could impose a life sentence for any felonious homicide – even one that traditionally might be considered involuntary manslaughter – unless the defendant was able to prove that his act was neither intentional nor criminally reckless.

Winship is concerned with substance rather than this kind of formalism.

[*Id.* at 698-99, 95 *S. Ct.* at 1888-89, 44 *L. Ed.* 2d at 519-20 (citations omitted).]

Accordingly, the Court invalidated the Maine homicide statute, holding that in homicide prosecutions the State bears the burden of proving beyond a reasonable

doubt the absence of heat of passion on sudden provocation:

Maine law requires a defendant to establish by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter. Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is as likely as not that he deserves a significantly lesser sentence. This is an intolerable result in a society where, to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter. We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case. Accordingly, the judgment below is reversed.

[*Id.* at 703-04, 95 *S. Ct.* at 1892, 44 *L. Ed.* 2d at 522 (citations omitted).]

In *Patterson v. New York*, 432 *U.S.* 197, 97 *S. Ct.* 2319, 53 *L. Ed.* 2d 281 (1977), the Court, in a 5-3 vote, qualified its holding in *Mullaney* by sustaining a New York statute that defined second-degree murder as "causing the death of another person with intent to do so" and placing on the defendant the burden of proving by a preponderance of the evidence the affirmative defense of extreme emotional disturbance. In *Patterson* the defendant, estranged from his wife, observed through a window that she was partially unclothed in the presence of the victim. He entered the house with a rifle, killing the victim with two shots to the head. Patterson was charged with second-

degree murder which, under New York law, required proof only of "intent to cause the death of another person" and "caus[ing] the death of such person or of a third person." N.Y. Penal Law § 125.25 (McKinney 1975). Unlike the Maine statute at issue in *Mullaney*, malice aforethought was not an element of second-degree murder under New York law. The statute provided as an affirmative defense that the accused acted "under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse," *ibid.*, and the trial court instructed the jury that the defendant had the burden of proving that defense by a preponderance of the evidence. The court further instructed the jury that if the defendant established that affirmative defense, it must convict him of manslaughter rather than murder. The jury convicted Patterson of murder. The New York Court of Appeals sustained the conviction against a due process challenge, 347 *N.E.*2d 898 (N.Y. 1976), distinguishing *Mullaney* on the basis that the New York statute did not shift to the defendant the burden of disproving any fact essential to establishing the elements of second-degree murder. *Patterson, supra*, 432 *U.S.* at 198-200, 97 *S. Ct.* at 2321-22, 53 *L. Ed.* 2d at 284-86.

In an opinion by Justice White, the Court upheld the New York statute on the basis that it imposed on the State the burden of proving all elements of the offense beyond a reasonable doubt.

> We cannot conclude that Patterson's conviction under the New York law deprived him of due process of law. The crime of murder is defined by the statute, which represents a recent revision of the state criminal code, as causing

> the death of another person with intent to do so. The death, the intent to kill, and causation are the facts that the State is required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts are either presumed or inferred in order to constitute the crime. The statute does provide an affirmative defense – that the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation – which, if proved by a preponderance of the evidence, would reduce the crime to manslaughter, an offense defined in a separate section of the statute. . . .
>
> Here, the jury was instructed in accordance with the statute, and the guilty verdict confirms that the State successfully carried its burden of proving the facts of the crime beyond a reasonable doubt. Nothing in the evidence, including any evidence that might have been offered with respect to Patterson's mental state at the time of the crime, raised a reasonable doubt about his guilt as a murderer; and clearly the evidence failed to convince the jury that Patterson's affirmative defense had been made out. It seems to us that the State satisfied the mandate of *Winship* that it prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [Patterson was] charged."
>
> [*Id.* at 205-206, 97 *S. Ct.* at 2324-25, 53 *L. Ed.* 2d at 289 (alteration in original) (citation omitted).]

The Court also observed that New York was not constitutionally compelled to disprove the availability of affirmative defenses to murder:

It is also very likely true that fewer convictions of murder would occur if New York were required to negative the affirmative defense at issue here. But in each instance of a murder conviction under the present law, New York will have proved beyond a reasonable doubt that the defendant has intentionally killed another person, an act which it is not disputed the State may constitutionally criminalize and punish. If the State nevertheless chooses to recognize a factor that mitigates the degree of criminality or punishment, we think the State may assure itself that the fact has been established with reasonably [sic] certainty. To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate.

> [*Id.* at 209, 97 *S. Ct.* at 2326, 53 *L. Ed.* 2d at 291.]

Finally, the Court distinguished *Mullaney* on the basis that the New York statute, unlike the Maine statute, did not presume an element of the crime unless rebutted by the defendant. Distinguishing the Maine statute at issue in *Mullaney*, the Court noted that

> [p]remeditation was not within the definition of murder; but malice, in the sense of the absence of provocation, was part of the definition of that crime. Yet malice, i.e., lack of provocation, was presumed and could be rebutted by the defendant only by proving by a preponderance of the evidence that he acted with heat of passion upon sudden provocation. In *Mullaney* we held

> that however traditional this mode of proceeding might have been, it is contrary to the Due Process Clause as construed in *Winship*.
>
> As we have explained, nothing was presumed or implied against Patterson; and his conviction is not invalid under any of our prior cases.
>
> [*Id.* at 215-16, 97 *S. Ct.* at 2330, 53 *L. Ed.* 2d at 295.]

Justice Powell, in a dissenting opinion joined by Justices Brennan and Marshall, sharply criticized what he characterized as the Court's formalistic distinctions between *Mullaney* at *Patterson*:

> Perhaps the Court's interpretation of *Winship* is consistent with the letter of the holding in that case. But little of the spirit survives. Indeed, the Court scarcely could distinguish this case from *Mullaney* without closing its eyes to the constitutional values for which *Winship* stands. As Mr. Justice Harlan observed in *Winship*, "a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." Explaining *Mullaney*, the Court says today, in effect, that society demands full confidence before a Maine factfinder determines that heat of passion is missing – a demand so insistent that this Court invoked the Constitution to enforce it over the contrary decision by the State. But we are told that society is willing to tolerate far less confidence in New York's factual determination of precisely the same functional issue. One must ask what possibly could explain this difference in societal

demands. According to the Court, it is because Maine happened to attach a name – "malice aforethought" – to the absence of heat of passion, whereas New York refrained from giving a name to the absence of extreme emotional disturbance.

With all respect, this type of constitutional adjudication is indefensibly formalistic. A limited but significant check on possible abuses in the criminal law now becomes an exercise in arid formalities. What *Winship* and *Mullaney* had sought to teach about the limits a free society places on its procedures to safeguard the liberty of its citizens becomes a rather simplistic lesson in statutory draftsmanship.

> [*Id.* at 223-24, 97 *S. Ct.* at 2334, 53 *L. Ed.* 2d at 300-01 (citations omitted).]

Nine years after its decision in *Patterson*, the Supreme Court revisited the *Winship* issue in *McMillan v. Pennsylvania*, 477 *U.S.* 79, 106 *S. Ct.* 2411, 91 *L. Ed.* 2d 67 (1986). *McMillan* concerned the constitutionality under the Due Process Clause and the Sixth Amendment's jury trial guarantee of Pennsylvania's Mandatory Minimum Sentencing Act, 42 Pa. Cons. Stat. § 9712 (1982) (Act). That Act provides that any person convicted of certain enumerated felonies must be sentenced to a minimum of five years' imprisonment if the sentencing judge determines, based on a preponderance of the evidence, that the person "visibly possessed a firearm" during the commission of the offense. However, the Act does not permit imposition of a sentence greater than that otherwise authorized for the underlying offense.

Each of the petitioners in *McMillan* was convicted of one of the enumerated felonies under the Act, and in all four cases the Commonwealth gave notice of its intent to proceed under the Act's mandatory sentencing provisions. No hearings were held, however, because the sentencing judges found the Act unconstitutional. The Supreme Court of Pennsylvania consolidated the four appeals and held that the Act did not violate the due process guarantee, *Commonwealth v. Wright*, 494 *A.*2d 354 (Pa. 1985), rejecting petitioners' contention that visible possession of a firearm is an element of each felony that must be proved beyond a reasonable doubt. *McMillan, supra*, 477 *U.S.* at 81-84, 106 *S. Ct.* at 2413-15, 91 *L. Ed.* 2d at 73-75.

The Supreme Court affirmed 5-4, in an opinion authored by then Justice Rehnquist. Relying primarily on its decision in *Patterson*, the Court emphasized the significance of the State's definition of the elements of a crime in applying the *Winship* principle:

> *Patterson* stressed that in determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive: "[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements *included in the definition of the offense* of which the defendant is charged." *Id.*, at 210, 97 *S. Ct.* at 2327 (emphasis added). While "there are obviously constitutional limits beyond which the States may not go in this regard," *ibid.*, "[t]he applicability of the reasonable-doubt standard . . . has always been dependent on how a State defines the offense that is charged in any given case," *id.*, at 211, n.12, 97 *S. Ct.* at 2327.

[*Id.* at 85, 106 *S. Ct.* at 2415, 91 *L. Ed.* 2d at 75 (alteration in original).]

Although acknowledging the existence of constitutional limits on a state's power to define the elements of an offense for due process purposes, the *McMillan* majority concluded that the Pennsylvania statute did not exceed those limits, and offered three justifications for that conclusion. First, unlike in *Mullaney*, the Act did not create an impermissible presumption relieving the prosecutor of the burden of proving an element of the offense. Second, the statute did not increase the maximum sentence beyond that imposed for violation of the underlying offense. Third, the statute did not appear to represent a legislative attempt to evade the reasonable doubt requirement. *Id.* at 86-89, 106 *S. Ct.* at 2416-18, 91 *L. Ed.* 2d at 76-78.

Dissenting, Justice Marshall, joined by Justices Brennan and Blackmun, rejected the majority's thesis and emphasized that "[w]hether a particular fact is an element of a criminal offense that, under *In re Winship*, must be proved by the prosecution beyond a reasonable doubt is a question that must be decided by this Court and cannot be abdicated to the States." *Id.* at 93, 106 *S. Ct.* at 2420, 91 *L. Ed.* 2d at 81 (Marshall, J., dissenting) (citation omitted).

In a separate dissent, Justice Stevens, who joined the majority in *Patterson*, rejected the majority's assertion that courts should defer to a state legislature's definition of a crime in determining the application of due process protections:

> Today the Court holds that state legislatures may not only define the offense with which a criminal defendant is charged, but may also authoritatively determine that the conduct so described – i.e., the prohibited activity which subjects the defendant to criminal sanctions – is *not* an element of the crime which the Due Process Clause requires to be proved by the prosecution beyond a reasonable doubt. In my view, a state legislature may not dispense with the requirement of proof beyond a reasonable doubt for conduct that it targets for severe criminal penalties. Because the Pennsylvania statute challenged in this case describes conduct that the Pennsylvania Legislature obviously intended to prohibit, and because it mandates lengthy incarceration for the same, I believe that the conduct so described is an element of the criminal offense to which the proof beyond a reasonable doubt requirement applies.
>
> Once a State defines a criminal offense, the Due Process Clause requires it to prove any component of the prohibited transaction that gives rise to both a special stigma and a special punishment beyond a reasonable doubt.
>
> [*Id.* at 96, 106 *S. Ct.* at 2421, 91 *L. Ed.* 2d at 83 (Stevens, J., dissenting).]

Distinguishing *Patterson*, Justice Stevens characterized that holding as upholding a state's refusal to " 'prove beyond a reasonable doubt every fact, the existence or nonexistence of which it [was] willing to recognize as an *exculpatory or mitigating circumstance* affecting the degree of culpability or the severity of the punishment' – in that case, the affirmative defense of extreme emotional disturbance." *Id.* at 99, 106 *S. Ct.* at 2423, 91 *L. Ed.* 2d at 84-85

(quoting *Patterson, supra*, 432 *U.S.* at 207, 97 *S. Ct.* at 2325, 53 *L. Ed.* 2d at 290 (Stevens, J., dissenting)). Justice Stevens distinguished the "aggravating fact" of visible possession of a firearm from the "mitigating fact" implicated by *Patterson*, noting that

> although States may reach the same destination either by criminalizing conduct and allowing an affirmative defense, or by prohibiting lesser conduct and enhancing the penalty, legislation proceeding along these two paths is very different even if it might theoretically achieve the same result.
>
> [*McMillan, supra*, 477 *U.S.* at 100, 106 *S. Ct.* at 2424, 91 *L. Ed.* 2d at 85-86 (Stevens, J., dissenting).]

Accordingly, Justice Stevens asserted that irrespective of the Pennsylvania Legislature's assertion that visible possession of a firearm is not an element of the offenses subject to the Act, the Due Process Clause requires that fact to be proved by the State beyond a reasonable doubt:

> Appropriate respect for the rule of *In re Winship* requires that there be some constitutional limits on the power of a State to define the elements of criminal offenses. The high standard of proof is required because of the immense importance of the individual interest in avoiding both the loss of liberty and the stigma that results from a criminal conviction. It follows, I submit, that if a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a "fact necessary to constitute the crime" within the meaning of our holding in *In re Winship*.
>
> [*Id.* at 103, 106 *S. Ct.* at 2425, 91 *L. Ed.* 2d at 87 (Stevens, J., dissenting).]

More than a decade after its decision in *McMillan* the Supreme Court again confronted the *Winship* issue in *Almendarez-Torres v. United States*, 523 *U.S.* 224, 118 *S. Ct.* 1219, 140 *L. Ed.* 2d 350 (1998). The statute at issue in *Almendarez-Torres* was 8 *U.S.C.A.* § 1326. Subsection (a) of that statute authorizes a prison term of up to two years for any previously deported alien who returns to the United States without special permission. Subsection (b)(2) of the statute authorizes a prison term of up to twenty years for "any alien described" in subsection (a) whose initial "deportation was subsequent to a conviction for commission of an aggravated felony." The question before the Court was whether subsection (b)(2) defines a separate crime the elements of which would have to be proved beyond a reasonable doubt, or simply authorizes an enhanced penalty. By a 5-4 vote, the Court concluded that subsection (b)(2) "is a penalty provision, which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime." 523 *U.S.* at ___, 118 *S. Ct.* at 1222, 140 *L. Ed.* 2d at 357.

Petitioner Almendarez-Torres pled guilty to a federal indictment charging that he had been found in the United States after having been deported in violation of 8 *U.S.C.A.* § 1326. At his plea hearing he admitted that his earlier deportation had occurred on the basis of three earlier convictions for aggravated felonies. At his sentencing hearing, petitioner contended that his maximum sentence was two years because the indictment made no

mention of his aggravated felony convictions. The District Court rejected that contention and imposed an eighty-five-month sentence. The Fifth Circuit Court of Appeals affirmed.

In affirming the lower courts, the Supreme Court initially relied on *McMillan, supra*, for the principle that legislative intent determines whether a provision in a criminal statute is an element of a crime or a sentencing enhancer, *id.* at ___, 118 *S. Ct.* at 1223, 140 *L. Ed.* 2d at 358, and concluded after reviewing the statutory provisions at issue and their legislative history that "Congress intended to set forth a sentencing factor in subsection (b)(2) and not a separate criminal offense." *Id.* at ___, 118 *S. Ct.* at 1226, 140 *L. Ed.* 2d at 363.

Next, the Court addressed the doctrine of "constitutional doubt," relied on by the dissenting Justices to support their view that the statute should be construed in a manner that avoided grave doubts concerning its constitutionality. The majority opinion declined to apply the doctrine:

> That is because the "constitutional doubt" doctrine does not apply mechanically whenever there arises a significant constitutional question the answer to which is not obvious. And precedent makes clear that the Court need not apply . . . the doctrine in circumstances similar to those here – where a constitutional question, while lacking an obvious answer, does not lead a majority gravely to doubt that the statute is constitutional.
>
> [*Id.* at ___, 118 *S. Ct.* at 1227, 140 *L. Ed.* 2d at 365.]

Finally, the Court rejected the contention that its emphasis in *McMillan* on the fact that the statute there did not "alter[ ] the maximum penalty for the crime," 477 *U.S.* at 87, 106 *S. Ct.* at 2417, 91 *L. Ed.* 2d at 77, required a different result in *Almendarez-Torres* where the statute increased the maximum sentence tenfold. The Court emphasized that "the sentencing factor at issue here – recidivism – is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." *Almendarez-Torres, supra*, 523 *U.S.* at ___, 118 *S. Ct.* at 1230, 140 *L. Ed.* 2d at 368. In addition, the Court noted that the mandatory minimum sentence at issue in *McMillan* could be more disadvantageous to a criminal defendant than an increase in the maximum sentence because the former is binding on a sentencing judge whereas the latter is not. Accordingly, the Court rejected the contention that a statutory provision that increases the maximum permissible sentence necessarily constitutes an element of the crime. *Id.* at ___, 118 *S. Ct.* at 1231, 140 *L. Ed.* 2d at 369-70.

Dissenting, Justice Scalia sharply criticized the majority's rejection of the "constitutional doubt" doctrine and its reliance on recidivism as a basis for distinguishing the concern expressed in *McMillan* about statutes that increase the maximum permissible sentence:

> But this parsing of various factors is really beside the point. No one can read our pre-*McMillan* cases, and especially *Mullaney* (whose limits were adverted to in *Patterson* but never precisely described) without entertaining a serious doubt as to whether the statute as interpreted by the Court in the present case is constitutional. And no one can read *McMillan*,

our latest opinion on the point, without perceiving that the determinative element in our validation of the Pennsylvania statute was the fact that it merely limited the sentencing judge's discretion within the range of penalty already available, rather than substantially increasing the available sentence. And even more than that: No one can read *McMillan* without learning that the Court was open to the argument that the Constitution requires a fact which does increase the available sentence to be treated as an element of the crime (such an argument, it said, would have "at least . . . superficial appeal," 477 *U.S.*, at 88, 106 *S. Ct.*, at 2417). If all that were not enough, there must be added the fact that many State Supreme Courts have concluded that a prior conviction which increases maximum punishment must be treated as an element of the offense under either their state constitutions, or as a matter of common law.

In the end, the Court cannot credibly argue that the question whether a fact which increases maximum permissible punishment must be found by a jury beyond a reasonable doubt is an easy one. That, perhaps, is why the Court stresses, and stresses repeatedly, the limited subject matter that § 1326(b) addresses – recidivism. It even tries, with utter lack of logic, to limit its rejection of the fair reading of *McMillan* to recidivism cases. "For the reasons just given," it says, "and in light of the particular sentencing factor at issue in this case – recidivism – we should take McMillan's statement [regarding the "superficial appeal" the defendant's argument would have had if the factor at issue increased his maximum sentence] to mean no more than

what it said, and therefore not to make a determinative difference here." *Ante* at 1231 (emphasis added). It is impossible to understand how *McMillan* could mean one thing in a later case where recidivism is at issue, and something else in a later case where some other sentencing factor is at issue. One might say, of course, that recidivism should be an exception to the general rule set forth in *McMillan* – but that more forthright characterization would display how doubtful the constitutional question is in light of our prior case law.

. . . .

What I have tried to establish – and all that I need to establish – is that on the basis of our jurisprudence to date, the answer to the constitutional question is not clear. It is the Court's burden, on the other hand, to establish that its constitutional answer shines forth clearly from our cases. That burden simply cannot be sustained. I think it beyond question that there was, until today's unnecessary resolution of the point, "serious doubt" whether the Constitution permits a defendant's sentencing exposure to be increased tenfold on the basis of a fact that is not charged, tried to a jury, and found beyond a reasonable doubt. If the Court wishes to abandon the doctrine of constitutional doubt, it should do so forthrightly, rather than by declaring certainty on a point that is clouded in doubt.

[*Id.* at ___-___, 118 *S. Ct.* at 1237-38, 140 *L. Ed.* 2d at 376-79 (citations omitted).]

The Supreme Court again confronted the *Winship* issue this term in *Jones v. United States*, ___ *U.S.* ___, 119 *S. Ct.* 1215, ___ *L. Ed.* 2d ___ (1999). The issue in *Jones*

involved the federal carjacking statute, 18 *U.S.C.A.* § 2119, and specifically considered whether the enhanced sentencing provisions of that statute should be treated as distinct offenses requiring inclusion in the indictment and proof of the criteria for enhanced sentencing beyond a reasonable doubt.

Jones and two accomplices held up two victims and stole their automobile. In the course of the carjacking one of Jones's accomplices stuck his gun in the left ear of one victim and then struck him on the head. Jones was apprehended when he crashed the stolen car into a telephone pole.

Jones and his accomplices were indicted for violation of the federal carjacking statute, 18 *U.S.C.A.* § 2119, which then read as follows:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall –
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

Neither the indictment nor the District Court's jury instructions contained any reference to serious bodily

injury or any facts relating to the victim's injuries. The jury convicted Jones of the carjacking offense and of aiding and abetting the use of a firearm in relation to a crime of violence. See 18 *U.S.C.A.* § 924(c).

The presentence report, however, recommended that Jones be sentenced to twenty-five years' imprisonment on the basis that one of the victims sustained a perforated eardrum and permanent hearing loss, constituting serious bodily injury for purposes of the carjacking statute. Jones objected, contending that serious bodily injury was an element of the crime that had neither been charged in the indictment nor proved beyond a reasonable doubt to the jury. The District Court concluded that serious bodily injury was merely a sentencing factor and imposed a twenty-five-year sentence on the carjacking count on the basis that serious bodily injury was established by a preponderance of the evidence. The District Court also sentenced Jones to a consecutive five-year sentence for the firearm offense. The Ninth Circuit Court of Appeals affirmed, *United States v. Oliver*, 60 *F.*3d 547 (1995), but remanded for resentencing on other grounds.

In a 5-4 decision, the Supreme Court reversed, construing the statute to define three distinct offenses in reliance on the established rule that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." ___ *U.S.* at ___, 119 *S. Ct.* at 1222, ___ *L. Ed.* 2d at ___ (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 *U.S.* 366, 408, 29 *S. Ct.* 527, 536, 53 *L. Ed.* 836, 849 (1909)). The Court first examined the structure of the carjacking statute and its

legislative history, as well as comparable federal criminal statutes, and concluded on the basis of that examination that "Congress probably intended serious bodily injury to be an element defining an aggravated form of the crime." ___ *U.S.* at ___, 119 *S. Ct.* at 1221, ___ *L. Ed.* 2d at ___. The Court also reviewed the post-*Winship* decisional law, emphasizing the question raised in *McMillan* whether "judicial factfinding by a preponderance [may] support the application of a provision that increases the potential severity of the penalty for a variant of a given crime," as well as "*Mullaney*'s insistence that a State cannot manipulate its way out of *Winship*," and "*Patterson*'s recognition of a limit on state authority to reallocate traditional burdens of proof." *Id.* at ___, 119 *S. Ct.* at 1224, ___ *L. Ed.* 2d at ___.

Responding to the dissent's challenge to state with precision the principle underlying the majority's view that the carjacking statute, as applied by the District Court, may violate the Constitution, the Court explained:

> The preceding paragraph in the text expresses that principle plainly enough, and we re-state it here: under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Because our prior cases suggest rather than establish this principle, our concern about the Government's reading of the statute rises only to the level of doubt, not certainty.

> [*Id.* at ___ n.6, 119 *S. Ct.* at 1224 n.6, ___ *L. Ed.* 2d at ___ n.6.]

Concurring, Justices Stevens and Scalia both expressed the belief that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Id.* at ___-___, 119 *S. Ct.* at 1228, ___ *L. Ed.* 2d at ___ (Stevens, J., concurring).

Justice Kennedy, dissenting, expressed the view that the Court's holding in *Almendarez-Torres* was controlling notwithstanding that the sentencing factor implicated there was recidivism, and predicted that the Court's holding would have a significant impact on state sentencing statutes:

> [T]he Court is eager to find controlling significance in the fact that the statute at issue in *Almendarez-Torres* made recidivism a sentencing factor, while the sentencing factor at issue here is serious bodily injury. This is not a difference of constitutional dimension, and *Almendarez-Torres* does not say otherwise. It is true that our statutory analysis was informed in substantial measure by the fact that recividism is a common sentencing factor. *Id.* at 230. In our constitutional analysis we invoked the long history of using recidivism as a basis for increasing an offender's sentence to illustrate the novel and anomalous character of the petitioner's proposed constitutional rule – i.e., that under *McMillan v. Pennsylvania* any factor that increases the maximum penalty for a crime must be deemed an element of the offense. We proceeded to reject that rule. *Almendarez-Torres v. United States*, 523 *U.S.* at 247.

. . . .

The rationale of the Court's constitutional doubt holding makes it difficult to predict the full consequences of today's holding, but it is likely that it will cause disruption and uncertainty in the sentencing systems of the States. Sentencing is one of the most difficult tasks in the enforcement of the criminal law. In seeking to bring more order and consistency to the process, some States have sought to move from a system of indeterminate sentencing or a grant of vast discretion to the trial judge to a regime in which there are more uniform penalties, prescribed by the legislature. See A. Campbell, *Law of Sentencing* §§ 1:3, 4:6-4:8 (2d ed.1991). These States should not be confronted with an unexpected rule mandating that what were once factors bearing upon the sentence now must be treated as offense elements for determination by the jury. *This is especially so when, as here, what is at issue is not the conduct of the defendant, but the consequences of a completed criminal act.*

[*Id.* at ___, 119 *S. Ct.* at 1236-38, ___ *L. Ed.* 2d at ___ (emphasis added).]

III

As the Court's opinion explains, *ante* at ___ (slip op. at 6-7), between the date of defendant's offenses and the date of his sentence the Legislature, in response to our decision in *State v. Mortimer*, 135 *N.J.* 517, *cert. denied*, 513 *U.S.* 970, 115 *S. Ct.* 440, 130 *L. Ed.* 2d 351 (1994), amended *N.J.S.A.* 2C:44-3(e) to delete the words, "at least in part with ill will, hatred or bias toward the victim." *L.* 1995, *c.* 211. As amended, that statute provides in part:

2C:44-3 Criteria for sentence of extended term of imprisonment

The court shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime . . . to an extended term if it finds, by a preponderance of the evidence, the grounds in subsection e.

. . .

e. The defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.

The Appellate Division majority, in sustaining the constitutionality of *N.J.S.A.* 2C:44-3(e), concluded that defendant's purpose to intimidate the victims because of their race related only to his motive, not to his criminal intent, and therefore did not implicate an element of the crime. 304 *N.J. Super.* at 157-58. The Court's opinion firmly rejects that distinction, acknowledging that "in ordinary circumstances proof of motive does not increase the penal consequences to an actor." *Ante* at ___ (slip op. at 20.) The Court also observes that the 1995 amendment to the statute "limits our ability to view this finding as merely a search for motive. We must search for firmer principles of decision." *Ibid.*

The Court's acknowledgment that a defendant's alleged purpose to intimidate his victims because of their race involves not merely motive but an aspect of criminal intent serves to distinguish the issue in this appeal from those that most recently divided the United States

Supreme Court in *Almendarez-Torres* and *Jones*. In *Almendarez-Torres*, the sentencing factor was recidivism, a factor unrelated to the defendant's purpose in committing the charged offense. In *Jones*, the sentencing factor at issue was whether serious bodily injury resulted from a carjacking, which also was unrelated to the defendant's intent in committing the underlying offense of carjacking. The significance of that distinction was emphasized by Justice Kennedy, writing for the four dissenters in *Jones*, who criticized the majority for treating "serious bodily injury" as an element of the offense: "This is especially so when, as here, what is at issue is not the conduct of the defendant, but the consequences of a completed act." *Jones, supra*, ___ *U.S.* at ___, 119 *S. Ct.* at 1238, ___ *L. Ed.* 2d at ___ (Kennedy, J., dissenting).

Unlike *Almendarez-Torres* and *Jones*, the sentencing enhancement at issue here does involve the *conduct* of the defendant, as the definition of conduct in the Code of Criminal Justice (Code) makes clear: " 'Conduct' means an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions." *N.J.S.A.* 2C:1-14(d). Directly related to the Code's definition of "conduct" is its definition of "element of an offense":

> "Element of an offense" means (1) such conduct or (2) such attendant circumstances or (3) such a result of conduct as
>
> (a) Is included in the description of the forbidden conduct in the definition of the offense;
>
> (b) Establishes the required kind of culpability;

> (c) Negatives an excuse or justification for such conduct;
>
> (d) Negatives a defense under the statute of limitations; or
>
> (e) Establishes jurisdiction or venue.
>
> [*N.J.S.A.* 2C:1-14(h).]

Our understanding of the Code's conception of an "element of an offense" also is informed by *N.J.S.A.* 2C:2-2, entitled "General requirements of culpability." That provision states generally that "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." *N.J.S.A.* 2C:2-2(a). The Code defines purposely, the state of mind referred to in *N.J.S.A.* 2C:44-3(e), as follows: "A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result." *N.J.S.A.* 2C:2-2(b)(1).

As the Supreme Court emphasized in *Mullaney, supra*, the due process protections afforded by the Court's holding in *Winship* cannot be undermined by states redefining the elements of crimes and characterizing essential factors as bearing only on sentencing. *Mullaney, supra*, 421 *U.S.* at 698-99, 95 *S. Ct.* at 1889-90, 44 *L. Ed.* 2d at 519-20. Accordingly, although defendant pled guilty to the second-degree crime of possession of a firearm for the purpose of using it unlawfully, *N.J.S.A.* 2C:39-4(a), pursuant to *N.J.S.A.* 2C:44-3(e) he was subject to sentencing as a first-degree offender if he committed that offense with a purpose to intimidate the victims because of their race.

Under the Code, defendant would have acted "purposely" if his conscious object in possessing and using the firearm was to intimidate the victims because of their race. *N.J.S.A.* 2C:2-2(b)(1). Such conduct, combined with defendant's purposeful state of mind, would constitute an element of the offense if it "establishe[d] the required kind of culpability." *N.J.S.A.* 2C:1-14(h)(b). As the dissenting judge observed below, *N.J.S.A.* 2C:44-3(e) requires proof of a purpose to intimidate because of race in order to "establish[ ] the required kind of culpability." 304 *N.J. Super.* at 165 (Wecker, J., dissenting). In my view, a fair reading of the Code's conception of an element of an offense demonstrates that conduct, accompanied by a purpose to intimidate because of race, embodies those characteristics that qualify unmistakably as an "element of an offense," and therefore is subject to the Code's mandate that "[n]o person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt." *N.J.S.A.* 2C:1-13(a).

The foregoing statutory analysis demonstrates that the Legislature's inclusion of a preponderance-of-the-evidence standard of proof in *N.J.S.A.* 2C:44-3(e) is structurally inconsistent with those basic provisions of the Code that define conduct, mental states, and elements of an offense. As a matter of statutory interpretation, I would invalidate *N.J.S.A.* 2C:44-3(e) to the extent that it purports to treat a defendant's purpose to intimidate because of race as a sentencing enhancement rather than as an element of an offense.

I also conclude that *N.J.S.A.* 2C:44-3(e) is unconstitutional under the Due Process Clause of the Fifth Amendment, and under the Sixth Amendment's notice and jury

trial guarantees, based on the United States Supreme Court decision in *Winship, supra,* and its progeny, and that it violates as well Article 1, Paragraph 1 of the New Jersey Constitution. See *Greenberg v. Kimmelman,* 99 *N.J.* 552, 568 (1985) (noting that Article 1, Paragraph 1 of New Jersey Constitution encompasses principles of due process and equal protection). The Supreme Court's jurisprudence on the *Winship* issue reflects the sharp divisions on that Court and the absence of a clear standard limiting the power of legislative bodies to delegate to a sentencing judge under a preponderance-of-the-evidence standard the determination of whether a sentencing enhancement factor has been established. Notwithstanding the analytical tensions and imprecision reflected by the Supreme Court precedents, there can be little doubt that the sentencing factor applied to this defendant – the purpose to intimidate a victim because of race – must fairly be regarded as an element of the crime requiring inclusion in the indictment and proof beyond a reasonable doubt. *N.J.S.A.* 2C:44-3(e) permits the sentencing judge, based on the statutory sentencing factor, to sentence a defendant as if the crime committed were one degree higher, potentially doubling the sentencing exposure for many defendants and, in the case of a first-degree offender, increasing that defendant's exposure from a ten-to-twenty-year range to life imprisonment. The Court expressly declines to decide whether that enhancement would offend due process, *ante* at ___ (slip op. at 31 n.2), but its reluctance to approve that level of enhancement demonstrates its discomfort with the concept that a critical determination of an aspect of culpability materially affecting a defendant's term of imprisonment would not

be found by a jury beyond a reasonable doubt. Unquestionably, the sentencing enhancement authorized by *N.J.S.A.* 2C:44-3(e) meets the standard of the constitutional principle that induced the Supreme Court to reverse in the *Jones* case. See *Jones, supra,* ___ *U.S.* at ___ n.6, 119 *S. Ct.* at 1224 n.6, ___ *L. Ed.* 2d at ___ n.6.

The Court's opinion attempts to reconcile *N.J.S.A.* 2C:44-3(e) with the Supreme Court precedents by analogizing defendant's biased purpose to recidivism:

> [T]he Legislature simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor. A finding of a biased motive or purpose to intimidate, like the factor of recidivism in the *Almendarez-Torres* analysis, is a very traditional sentencing factor.
>
> [*Ante* at ___ (slip op. at 26).]

The difference, however, is glaring. The factor of recidivism is readily determined on the basis of the official court record of a prior conviction; it involves no inquiry into the defendant's conduct in perpetrating the current offense; and recidivism, of course, involves no inquiry in connection with the defendant's mental state in committing the current offense. Neither the *Jones* case, in which the sentencing factor was serious bodily injury to a carjacking victim, nor *McMillan,* in which the sentencing factor was visible possession of a firearm in the course of committing various felonies, required the sentencer to make findings of fact, such as are required by *N.J.S.A.* 2C:44-3(e), about the mental state of a defendant when he committed the subject offense. Because under our Code a finding that a defendant possessed the requisite mental

state is indispensable to a conviction, *N.J.S.A.* 2C:2-2, there simply can be no doubt that defendant's purpose to intimidate these victims because of their race must be regarded as a material element of the charged offenses.

The Court correctly cautions that if a defendant's purpose to intimidate based on race were an element of his criminal offense, that could "create[ ] an added risk of prejudice for defendants. It would open trials to evidence of former acts of bias on the part of the actor." *Ante* at ___ (slip op. at 29). That concern is a significant one and undoubtedly could be addressed by implementing a variant of the procedure we followed in *State v. Ragland,* 101 *N.J.* 33 (1985), *reconsidered,* 105 *N.J.* 189 (1986). The defendant in *Ragland* was charged with unlawful possession of a weapon and possession of a weapon by a convicted felon. We held that the "two charges must be tried separately since proof that defendant was a convicted felon (required in the trial of the latter charge) clearly tends to prejudice the jury in considering the former." 105 *N.J.* at 193. That procedure was followed in *Ragland* using the same jury. That jury first tried the unlawful possession charge and then tried the charge of possession by a convicted felon. *Id.* at 195. That procedure could be adapted to the charges against defendant, resulting in the same jury first trying the possession offenses and subsequently deliberating on the charge that the possessory offenses were committed with a purpose to intimidate the victims because of their race.

IV

The principle that fortifies my conclusion that defendant's convictions and sentence must be reversed because of the unconstitutionality of *N.J.S.A.* 2C:44-3(e) was simply and eloquently expressed by Justice Brennan in *Winship* and bears repetition here:

> Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. . . .
>
> [*In re Winship, supra*, 397 *U.S.* at 364, 90 *S. Ct.* at 1072-73, 25 *L. Ed.* 2d at 375.]

Accordingly, I would reverse the judgment of the Appellate Division and remand the matter for a new trial consistent with this opinion.

Justice Handler joins in this opinion.

SUPREME COURT OF NEW JERSEY

NO. A-164 SEPTEMBER TERM 1997

ON APPEAL FROM Appellate Division, Superior Court

ON CERTIFICATION TO _____

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHARLES APPRENDI, JR.,

Defendant-Appellant.

DECIDED June 24, 1999

Chief Justice Poritz PRESIDING

OPINION BY Justice O'Hern

CONCURRING OPINION BY _____

DISSENTING OPINION BY Justice Stein

CHECKLIST	AFFIRM	REVERSE & REMAND
CHIEF JUSTICE PORITZ	X	
JUSTICE HANDLER		X
JUSTICE POLLOCK	X	
JUSTICE O'HERN	X	
JUSTICE GARIBALDI	X	
JUSTICE STEIN		X
JUSTICE COLEMAN	X	
TOTALS	5	2

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APEALLTE DIVISION

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION
A-1587-95T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHARLES APPRENDI, JR.,

Defendant-Appellant.

APPROVED FOR PUBLICATION

AUG 19 1997

APPELLATE DIVISION

WECKER, J.S.C., (temporarily assigned) dissenting.

I dissent from the majority's affirmance of defendant's extended term sentence under *N.J.S.A.* 2C:44-3e. Section e of 2C:44-3 was enacted as part of the so-called "bias crime" law. L. 1990, c. 87, § 4.[1] Section e was incorporated into the Code of Criminal Justice as a sentencing enhancement provision, not as an element of the offense, and mandates an extended term if requested by the prosecutor and if the sentencing judge finds by a preponderance of the evidence that

> [t]he defendant in committing the crime acted[, at least in part, with ill will, hatred or bias

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[1] Section 1 of this legislation added similar language to *N.J.S.A.* 2C:12-1e (assault), and § 2 added similar language to *N.J.S.A.* 2C:33-4d (harassment).

> toward, and][2] with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.[3]
>
> [*N.J.S.A.* 2C:44-3e.]

I disagree with the majority's conclusion that it is permissible to treat a defendant's purpose in committing a crime as a mere sentencing factor rather than as an element of the crime itself. To do so is to deprive the defendant of two fundamental constitutional rights: the right to trial by jury[4] and the right to be convicted of a crime only upon proof of guilt beyond a reasonable doubt.[5] Those guarantees are at the heart of our constitutional system of government. *See, e.g., State v. Medina*, 147 *N.J.* 43, 49-50 (1996), *cert. denied*, ___ *U.S.* ___, 117 *S.Ct.* 1476, 137 *L. Ed.* 2d 688 (1997); *State v. Anderson*, 127 *N.J.* 191, 199-201 (1992). The Legislature has incorporated those guarantees into the Code of Criminal Justice. *N.J.S.A.* 2C:1-13a.

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[2] The bracketed portion was deleted, after the offense for which defendant was convicted, by L. 1995, c. 211, § 3, in response to *R.A.V. v. City of St. Paul*, 505 *U.S.* 377, 112 *S.Ct.* 2538, 120 *L. Ed.* 2d 305 (1992). *See also State v. Mortimer*, 135 *N.J.* 517, 529 (1993), *cert. denied*, 513 *U.S.* 970, 115 *S.Ct.* 440, 130 *L. Ed.* 2d 351 (1994).

[3] Gender and handicap were added by L. 1995, c. 211, § 3.

[4] *U.S. Const.*, amends. VI and XIV; *N.J. Const.*, art. I, ¶¶ 9, 10.

[5] *See, e.g., In re Winship*, 397 *U.S.* 358, 364, 90 *S.Ct.* 1068, 1073, 25 *L.Ed.*2d 368, 375 (1970) (interpreting *U.S. Const.*, amend. XIV); *State v. Anderson*, 127 *N.J.* 191, 200-01 (1992) (interpreting *N.J. Const.*, art. I, ¶ 1). *See also State v. Ragland*, 105 *N.J.* 189, 193-94 (1986).

My dissent rests on this syllogism: (a) the Federal and State Constitutions require that the jury decide each element of a crime beyond a reasonable doubt; (b) "purpose to intimidate . . . because of race, [or] color" is an element of the crime when that purpose raises the sentence for the crime; therefore (c) the Constitution requires that the jury decide whether the defendant acted with the purpose to intimidate because of the victim's race or color. *Cf. Anderson, supra,* 127 *N.J.* at 206. The State's power to define the elements of a crime cannot extend, as the majority holds, to defining away the actor's culpable purpose as an element of the crime – a crime for which this defendant received a sentence beyond the ordinary term for a second degree offense. *Cf. Mullaney v. Wilbur,* 421 *U.S.* 684, 698-99, 95 *S.Ct.* 1881, 1889-90, 44 *L. Ed.* 2d 508, 519-20 (1975).

Applied as a sentencing enhancement provision, this statute falls on the impermissible side of the constitutional line, and violates both the United States and the New Jersey Constitutions. The substance of section e can be saved only by recognizing the forbidden, biased purpose as an element of the underlying offense and requiring that a jury find proof of that purpose beyond a reasonable doubt. Defendant does not separately raise the right to indictment by a grand jury with respect to each element of the offense charged. *See N.J. Const.,* art. I, ¶ 8. *See also State v. D'Amato,* 218 *N.J. Super.* 595, 607 (App. Div. 1987). Nevertheless, that right follows once we recognize the purpose as an element of the more culpable offense. The Indictment returned by the grand jury against this defendant did not allege the prohibited purpose set forth in *N.J.S.A.* 2C:44-3e with respect to Count

18, the firearm charge for which defendant received an extended term.[6] Defendant's guilty plea did not provide a factual basis for the prohibited purpose, and he denied such purpose at the sentencing hearing. While defendant waived his right to jury trial on the underlying charge, he did not waive that right, or the right to proof beyond a reasonable doubt, with respect to the prohibited purpose.

By defining purpose as motive and not intent, the majority concludes that defendant's purpose is not an element of the crime. While motive need not be an element of an otherwise purposeful crime, it can be an element, for example as in the statute mandating a life sentence without parole for the murder of a member of law enforcement. *See N.J.S.A.* 2C:11-3b(2). Because section e elevates the culpability of the crime based on defendant's purpose, that purpose – whether it be described as motive or intent – must be deemed an element of the more serious crime, and not just a sentencing factor.

I agree that *State v. Mortimer,* 135 *N.J.* 517, 529 (1994), *cert. denied,* 513 *U.S.* 970, 115 *S.Ct.* 440, 130 *L. Ed.* 2d 351 (1994), resolves defendant's vagueness challenge to *N.J.S.A.* 2C:44-3e. *Mortimer,* however, does not address the constitutional infirmities of section e because the penalty enhancement provision of *N.J.S.A.* 2C:33-4d that was challenged in *Mortimer*[7] did not take the element of

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[6] The indictment included that purpose in Count 20, charging defendant with fourth degree harassment in violation of *N.J.S.A.* 2C:33-4d. Count 20 was dismissed in accordance with defendant's plea agreement.

[7] The Court held *N.J.S.A.* 2C:33-4d constitutional after narrowing the original language to avoid unconstitutional

purpose from the jury, nor allow a defendant's purpose to be found on less than proof beyond a reasonable doubt.[8] In *Wisconsin v. Mitchell*, 508 *U.S.* 476, 124 *L. Ed.* 2d 436, 113 *S.Ct.* 2194 (1993), the Supreme Court held that sentence enhancement for a defendant who selected the victim because of race did not violate defendant's First Amendment right of expression. However, as Judge Stern recognizes in footnote 1 of his concurring opinion, the challenged Wisconsin statute required the jury to determine whether defendant acted on account of the victim's race.

The majority concludes that the alleged purpose to intimidate because of race or color "defines motive, not intent," and therefore can be left to the judge to determine by a mere preponderance of the evidence. The Code itself suggests otherwise. "Purpose" in the criminal code is defined by *N.J.S.A.* 2C:2-2b(1):

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vagueness. That statute, defining harassing conduct as a petty disorderly persons offense, raises the offense to a fourth degree crime if the conduct is committed "with a purpose to intimidate . . . because of race, color, religion, gender, handicap, sexual orientation or ethnicity."

[8] Where a similar prohibited purpose to intimidate raises a simple assault from a disorderly persons offense to a fourth degree crime, the assault statute so provides. *N.J.S.A.* 2C:12-1(e). Because there is no extended term applicable to a disorderly persons or a petty disorderly persons conviction, *see* *N.J.S.A.* 2C:43-7a, the bias crime legislation incorporated the prohibited purpose into the provisions criminalizing harassment and assault. Indeed, since the petty disorderly offense is not indictable, the more serious charge of assault or harassment with the purpose to intimidate because of status triggers the right to grand jury indictment and jury trial.

> A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist. "With purpose," "designed," "with design" or equivalent terms have the same meaning.
>
> [emphasis added.]

The prohibited purpose described by section e – to intimidate because of race, etc. – fits precisely within the category of a result that is the actor's "conscious object . . . to cause. . . . " Furthermore, the victim's status within a protected category – in this case, race or color – is indeed an "attendant circumstance[ ]" that the defendant had to believe existed. There can hardly be a clearer example of acting with purpose than that spelled out by *N.J.S.A.* 2C:44-3e.

Moreover, the Code defines an "element of an offense" to include conduct, or attendant circumstances, or a result of conduct, if it

> (a) Is included in the description of the forbidden conduct in the definition of the offense;
>
> [or]
>
> (b) Establishes the required kind of culpability. . . .
>
> [*N.J.S.A.* 2C:1-14h]

An actor's purpose to intimidate because of color or race must be construed as part of the definition of the offense,

irrespective of where it appears in the Code. Moreover, 2C:44-3 shows us that acting with the proscribed purpose "establishes the required kind of culpability" – culpability that requires punishment as if for a crime one degree higher.

Except for *N.J.S.A.* 2C:44-3e, wherever the Code defines the seriousness of an offense (and thus the maximum sentence allowed) in terms of the actor's purpose, that purpose is treated as an element of the offense and can be found only by a jury, upon proof beyond a reasonable doubt. The net effect of section e, as recognized by the majority, is to elevate the substantive offense – in this case, unlawful possession of a firearm – from a second to a first degree crime. Where the grading of a Code offense depends upon the defendant's mental state, determining that purpose has always been the jury's province. The most obvious example is the homicide statute. It would be unthinkable to instruct the jury in a homicide trial to decide only whether the defendant's act caused the victim's death, leaving it to the sentencing judge to decide, based upon a mere preponderance of the evidence, whether the defendant intended death or serious injury likely to lead to death; or whether defendant acted recklessly; and if so, whether with a wanton disregard for human life. It would be equally unthinkable in a trial for lewdness under *N.J.S.A.* 2C:14-4 for a sentencing judge and not a jury to decide whether the defendant acted "for the purpose of arousing or gratifying . . . sexual desire . . . ," thereby raising the offense from a disorderly persons to a fourth degree crime. *See also N.J.S.A.* 2C:13-5 (criminal coercion); *N.J.S.A.* 2C:17-1 (arson).

Section e is distinguishable from every other sentence enhancing provision of the Code in that it extends the term of the sentence based on the defendant's mental state at the time of the offense. Except for the extended term provision at issue here, the Code neither mandates nor allows an extended term based upon the defendant's state of mind. The Code provides extended terms solely based upon objective facts. *See N.J.S.A.* 2C:44-3 a, b, c, d, f and g.

The analogy to mandatory parole ineligibility terms for crimes committed with a firearm (*N.J.S.A.* 2C:44-3d, the Graves Act) is not compelling. Graves Act sentencing is not conditioned upon the defendant's mental state, and mental state has historically and constitutionally been an element of the substantive offense.[9]

Section e is also distinguishable from every other Code provision where the status of the victim determines the degree of the crime, and therefore the maximum length of the sentence. The jury in every such case, and not the judge, is required to find beyond a reasonable doubt that the victim held the protected status. *See, e.g., N.J.S.A.* 2C:11-3b(2) (murder of a police officer); *N.J.S.A.* 2C:14-2 (sexual assault); *N.J.S.A.* 2C:12-1b (aggravated assault). Wherever a particular fact determines the degree of a Code offense, and therefore the maximum prison sentence, the jury determines that fact upon proof beyond

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[9] When mental state is an issue in a civil case that issue is normally sufficient to withstand a motion for summary judgment and require a jury trial. *See* Pressler, Current N.J. Court Rules, comment on *R.* 4:46-2, at 1317 (1997). *A fortiori*, mental state must be a jury question in a criminal trial.

a reasonable doubt. For example, theft can be anything from a second degree crime to a disorderly persons offense, depending upon the value the jury places on the stolen property. *See N.J.S.A.* 2C:20-26.

The issue before us in this case is not whether more severe punishment is appropriate for crimes committed to intimidate the victim because that person is a member of a protected group. The Legislature has said that it is. Nor is the issue whether the State could have proved to a jury beyond a reasonable doubt that this defendant acted with such purpose. Implicit or explicit speculation that a jury would have found the forbidden purpose does not justify leaving that issue to the judge or denying defendant the right to proof beyond a reasonable doubt. Where the State intends to seek a mandatory extended term sentence because the underlying crime is accompanied by the forbidden purpose set forth in *N.J.S.A.* 2C:44-3e, then unless the defendant expressly waives a jury, only a jury can find the defendant guilty and then only upon proof beyond a reasonable doubt.

Defendant's extended term sentence should be vacated and the matter remanded for resentencing to an ordinary second degree term as provided by *N.J.S.A.* 2C:43-6.

I would reverse.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ R. Emille Cox
Clerk

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1587-95t2

STATE OF NEW JERSEY,
Plaintiff-Respondent,
v.
CHARLES APPRENDI, JR.,
Defendant-Appellant.

APPROVED FOR PUBLICATION
AUG 19 1997
APPELLATE DIVISION

STERN, J.A.D., concurring.

In *McMillan v. Pennsylvania*, 477 *U.S.* 79, 106 *S. Ct.* 2411, 91 *L. Ed.* 2d 67 (1986), the Supreme Court rejected Fourteenth Amendment due process clause and Sixth Amendment arguments addressed to Pennsylvania's statute requiring a five-year minimum sentence for certain crimes committed with a firearm. The arguments included assertions that the statute was unconstitutional because it permitted proof of elements of an offense by a mere preponderance of the evidence and without the need for jury trial.

The Pennsylvania statute there involved "does not authorize a sentence in excess of that otherwise allowed for th[e] offense"; it "neither provides for an increase in the maximum sentence . . . nor authorizes a separate sentence. . . . " *Id.* at 82-83, 106 *S. Ct.* at 2414, 91 *L. Ed.* 2d at 73-74. Rather, the Pennsylvania statute "merely requires a minimum sentence of five years, which may be

more or less than the minimum sentence that might otherwise have been [lawfully] imposed" within the range of sentence for the crime. *Id. at 83-88, 106 S. Ct.* at 2415-17, 91 *L. Ed.* 2d at 74-75.

The statute [with] which we deal, *N.J.S.A.* 2C:44-3e, requires an extended term. In discussing the burden of proof issue, the *McMillan* Court referred to prior rejections of similar due process arguments addressed to "an enhanced sentence," *id.* at 93, 106 *S. Ct.* at 2419, 91 *L. Ed.* 2d at 80, and Judge Humphreys' comprehensive opinion traces the post-*McMillan* treatment of similar issues by the federal Courts of Appeal.

The required culpability or state of mind traditionally is an element of the offense which the State must prove by proof beyond a reasonable doubt. *See, e.g., In re Winship*, 397 *U.S.* 358, 90 *S. Ct.* 1068, 25 *L. Ed.* 2d 368 (1970); *State v. Medina*, 147 *N.J.* 43, 49-50 (1996), *cert. denied*, ___ *U.S.* ___, 117 *S. Ct.* 1476, 137 *L. Ed.* 2d 688 (1997); *see also N.J.S.A.* 2C:2-2. And where a sentence of over six months may be imposed, there is a traditional right of trial by jury. *See, e.g., Baldwin v. New York*, 399 *U.S.* 66, 90 *S. Ct.* 1886, 26 *L. Ed.* 2d 437 (1970); *Duncan v. Louisiana*, 391 *U.S.* 145, 88 *S. Ct.* 1444, 20 *L. Ed.* 2d 491 (1968); *In re Yengo*, 84 *N.J.* 111, 120-21 (1980), *cert. denied*, 449 *U.S.* 1124, 101 *S. Ct.* 941, 67 *L. Ed.* 2d 110 (1981). Yet Judge Humphreys' thorough and exhaustive opinion demonstrates that there is a difference, for sentencing purposes, between culpability or state of mind, on the one hand, and motive on the other.[1] *See also N.J.S.A.* 2C:1-4, 1-5, 1-13a, 1-14h, i.

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[1] *Wisconsin v. Mitchell*, 508 *U.S.* 476, 480, 113 *S. Ct.* 2194, 2197, 124 *L. Ed.* 2d 436, 442 (1993), upheld a statute providing for an enhanced sentence because the crime was "committed . . . because of the race, religion [or] color" of the victim. However, the statute directed that the fact-finder return a "special verdict" on the question and only First Amendment issues were involved. *Id.* at 481 n.1, 113 *S. Ct.* at 2197 n.1, 124 *L. Ed.* 2d at 442 n. 1.

I concur in Judge Humphreys' opinion in this case because the sentence enhancer is in a general sentencing provision of the Code adopted after the Code's provisions establishing the crime, *see McMillan, supra*, 477 *U.S.* at 86, 90, 106 *S. Ct.* at 2416, 2418, 91 *L. Ed.* 2d at 79, and feel bound by our Graves Act cases which mandate ineligibility terms on ordinary and required extended term sentences where a judge finds by a preponderance of the evidence that defendant used or possessed a firearm notwithstanding the fact that the offense for which he or she was convicted did not necessarily involve use or possession of a firearm as an element thereof. *See N.J.S.A.* 2C:43-6c, d; 2C:43-7c; *State v. Stewart*, 96 *N.J.* 596, 605-06 (1984); *see also, e.g., State v. Haliski*, 140 *N.J.* 1 (1995); *State v. White*, 98 *N.J.* 122, 131 (1984). Defendant does not contend that the objective finding required under the Graves Act or the statute in *McMillan* is constitutionally significant when compared with the relevant fact finding necessary for an enhanced sentence for a bias crime. Nor does defendant point to any State constitutional policy or value which justifies or requires different treatment of the issue under state law.

I emphasize that my vote in this case does not signal a view that legislation which alters traditional values with respect to fact-finding in criminal cases should be treated liberally. I also emphasize that we decide only the

precise constitutional issues raised by the defendant in this case.

I hereby certify that the
foregoing is a true copy of the
original on file in my office.

/s/ R. Emille Cox
Clerk

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1587-95T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHARLES APPRENDI, JR.,

Defendant-Appellant.

APPROVED FOR PUBLICATION

AUG 19 1997

APPELLATE DIVISION

(Filed Aug. 19, 1999)

Argued February 4, 1997 – Decided AUG 19 1997

Before Judges Stern, Humphreys and Wecker.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County.

Joseph D. O'Neill argued the cause for appellant (Joseph D. O'Neill, attorney; Mr. O'Neill and Charles I. Coant, on the brief).

Lisa Sarnoff Gochman argued the cause for respondent (Peter Verniero, attorney General of New Jersey, attorney; Ms. Gochman, of counsel and on the brief).

The opinion of the court was delivered by

HUMPHREYS, J.A.D.

The defendant appeals his extended term sentence which was imposed pursuant to *N.J.S.A.* 2C:44-3(e) (the "Hate Crime Statute"). The defendant asserts that the statute is unconstitutional because: (1) the statute is too vague; (2) the statute violates his constitutional right to

due process by using a preponderance of the evidence standard.

We have thoroughly reviewed the record and considered the arguments presented. We conclude that the statute is constitutional and affirm.

I

The defendant fired a rifle on two occasions in 1994 at the home of a neighbor. On the first occasion, a bullet entered the third floor bedroom of one of the neighbor's three children. On the second occasion, defendant fired several times and as a result the neighbor's front door and windows were "bullet-riddled." Fortunately, no one was injured. The defendant is white; the neighbor is an African-American. The police later searched the defendant's home and found an "arsenal of weapons," including an anti-personnel bomb.

The defendant was charged in an indictment with various crimes, including first-degree attempted murder. He pled guilty on July 24, 1995 to counts three and eighteen charging him with the second degree crime of possession of a firearm for an unlawful purpose in violation of *N.J.S.A.* 2C:39-4(a) and to count twenty-two charging him with the third degree crime of unlawful possession of a prohibited weapon, the anti-personnel bomb, in violation of *N.J.S.A.* 2C:39-3(a). The defendant conditioned his plea upon the right to appeal his sentence. *See R.* 3:19-3(f).

The State moved to have the defendant sentenced to an extended term pursuant to *N.J.S.A.* 2C:44-3(e). That statute provides:

> The court shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime, . . . to an extended term if it finds, by a preponderance of the evidence, the grounds in subsection e. . . .
>
> e. The defendant in committing the crime acted, at least in part, with ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity.
>
> [*Ibid. but see* L. 1995, c. 211, 93, eff. Aug. 14, 1995 (amending the text of this statute).]

The extended sentence for the defendant's second degree crimes is between ten and twenty years which is the ordinary range for a first degree crime. For his third degree crime, the extended sentence would be five to ten years which is the ordinary range for a second degree crime. *See N.J.S.A.* 2C:43-7(a)(3), (4); *N.J.S.A.* 2C:43-6(a)(2), (3). In effect, hate crimes are sentenced one degree higher.

A police officer testified at the hearing on the State's motion that the defendant had told the police that he shot at the house because he knew that blacks were living there and he wanted to give them "a message that they were in his neighborhood."

The defendant, a pharmacist, testified at the hearing. He said that he shot at the front door because the "glass and the purple door" caught his eye and that at the time

of the incident, he was under the influence of alcohol and drugs. He denied that he shot at the house because he wanted to keep blacks away from the area. He also denied that he was a racist or a member of any racist group. He said that he had black friends and had no bias against African-Americans. He testified that he lied to the police about his reasons for shooting, because the police officer threatened him and the defendant wanted to get the interrogation over with.

A psychologist testifying for the defendant at the hearing said that the defendant suffered from an obsessive-compulsive disorder, a cyclothymic disorder (excessive mood swings), drug dependence, alcohol abuse, the impulse disorder of kleptomania, and premature ejaculation. The psychologist concluded that a person of defendant's personality type would say or do almost anything, including lie, to get out of a police interrogation.

The judge found that the testimony of the police officer was "credible, believable." The judge said that the questioning of the defendant by the police "was not overbearing. It was not onerous or is not in any sense dictatorial." The judge said he was "satisfied that the crime was motivated by racial bias" and that the defendant's explanation for the shooting was bizarre. The judge concluded that the defendant had changed his story in order to avoid punishment for a bias crime. The judge found that "the standard of proof required by the statute [preponderance of the evidence] has been met. The defendant is subject to enhanced penalties."

The defendant was sentenced on count eighteen to an extended term of twelve years with a parole ineligibility

of four years, the mandatory minimum parole ineligibility under the Graves Act. *See N.J.S.A.* 2C:43-6(c). He was sentenced on count three to a concurrent term of seven years imprisonment with a three year parole bar and on count twenty-two to a concurrent term of three years imprisonment. He was ordered to pay $1,980 restitution to the victim. On each of the three counts, a $100 Violent Crimes Compensation Board penalty and a $75 Safe Street Act penalty were imposed. The remaining counts were dismissed.

II

The defendant contends that the statute is too vague. *See State v. Afanador,* 134 *N.J.* 162, 170 (1993) (a criminal statute is unconstitutionally vague "if persons of common intelligence must necessarily guess at its meaning and differ as to its application"); *State v. Cameron,* 100 *N.J.* 586, 593 (1985) (a statute is facially invalid where it is "impermissibly vague in all its application, that is, there is no conduct that it proscribes with sufficient certainty").

The defendant's contention is refuted by the decision of the *New Jersey Supreme Court in State v. Mortimer,* 135 *N.J.* 517, 529, *cert. denied,* 513 *U.S.* 970, 115 *S. Ct.* 440, 130 *L. Ed.* 2d 351 (1994). In that case, the Court considered the constitutionality of a section of the Hate Crime Statute, *N.J.S.A.* 2C:33-4(d), which provided that "harassment," a petty disorderly persons offense, would be raised to a fourth degree offense if the defendant "acted, at least in part, with ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation or

ethnicity." The defendant in *Mortimer, supra,* challenged the statute on a number of constitutional grounds including vagueness. The Supreme Court said that if the statute were "construed narrowly and applied to a proper predicate offense, subsection d withstands a 'vagueness' challenge." 135 *N.J.* at 531. The Court cured the vagueness problem by excising the words "at least in part, with ill will, hatred or bias toward." *Id.* at 534.

The section of the Hate Crime Statute at issue in the present case, *N.J.S.A.* 2C:44-3(e), has the same language as that construed in *Mortimer*. As was done in *Mortimer*, we will excise the words "at least in part, with ill will, hatred or bias toward" and thereby overcome the vagueness challenge. We note that the Legislature has already made this change to the text of the statute (the statute was amended by L.1995, c. 211, § 3, eff. Aug. 14, 1995).

III

The Hate Crime Statute provides for an extended term based upon a finding of bias by a preponderance of the evidence. *N.J.S.A.* 2C:44-3(e). The Due Process clause of the United States Constitution "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 *U.S.* 358, 364, 90 *S. Ct.* 1068, 1073, 25 *L. Ed.* 2d 368, 375 (1970); *accord State v. Anderson*, 127 *N.J.* 191, 200-01 (1992). The defendant argues that using the preponderance of evidence standard to mandate an extended term sentence violates the constitutional requirement that the State

must prove the elements of a crime by the reasonable doubt standard.

The flaw in the defendant's argument is that the Legislature has not made racial bias an element of the crime. The Hate Crime Statute acts as a sentencing factor. The language in the statute is not included in the definition of any crime in the New Jersey Code of Criminal Justice. Instead, the statute is included in a section of the code entitled "authority of court in sentencing." As to sentencing factors which are not elements of a crime, the State's burden of proof is not subject to the reasonable doubt standard. *See McMillan v. Pennsylvania*, 477 *U.S.* 79, 91, 106 *S. Ct.* 2411, 2419, 91 *L. Ed.* 2d 67, 79 (1986).

A State has the power to define the elements of a crime. The State's definition of the elements of the crime is usually "dispositive." *Id.* at 85, 106 *S. Ct.* at 2415, 91 *L. Ed.* 2d at 75. The State's power to define the elements of a crime has constitutional limits. *Id.* at 91, 106 *S. Ct.* at 2419, 91 *L. Ed.* 2d at 79; *Paterson v. New York*, 432 *U.S.* 197, 210, 97 *S. Ct.* 2319, 2327, 53 *L. Ed.* 2d 281, 292 (1977) (there are constitutional limits to the State's power to redefine the elements of a crime so as to eliminate the reasonable doubt standard); *Mullaney v. Wilbur*, 421 *U.S.* 684, 699, 95 *S. Ct.* 1881, 1889-90, 44 *L. Ed.* 2d 508, 519-20 (1975) (the State may not require a defendant charged with murder to bear the burden of proving the elements of manslaughter in order to reduce the crime to manslaughter; the State may not undermine due process by redefining elements that constitute different crimes and characterizing them as factors bearing solely on punishment).

In *McMillan, supra,* the State statute provided for a mandatory minimum sentence of five years imprisonment if the sentencing judge found by a preponderance of the evidence that the defendant "visibly possessed" a firearm during the commission of certain enumerated felonies. The Supreme Court found the statute to be constitutional. The Court said that the constitutionality of a statute redefining a crime would "depend on differences of degree" and that the statute in *McMillan* fell on the "permissible side of the constitutional line." 477 *U.S.* at 91, 106 *S. Ct.* at 2419, 91 *L. Ed.* 2d at 79.

The Court pointed out in *McMillan* that the statute did not create a presumption that the person was guilty of a crime and did not restructure existing crimes to evade the requirements of the Due Process clause. *Id.* at 87, 106 *S. Ct.* at 2416-17, 91 *L. Ed.* 2d at 77. The Court said: "[t]he statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Id.* at 88, 106 *S. Ct.* at 2417, 91 *L. Ed.* 2d at 77. Instead, the State has taken a traditional sentencing factor, possession of a firearm, and "dictated the precise weight to be given that factor." *Id.* at 89-90, 106 *S. Ct.* at 2418, 91 *L. Ed.* 2d at 79. The Court also said that the defendants' claim that visible possession is "really" an element of the crime, "would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment. . . . " *Id.* at 88, 106 *S. Ct.* at 2417, 91 *L. Ed.* 2d at 77-78.

The New Jersey Hate Crime Statute does not create a presumption of guilt nor does it restructure any crimes. The statute is not "tailored to permit the [racial or other

bias] finding to be a tail which wags the dog of the substantive offense." *See id.* at 88, 106 *S. Ct.* at 2417, 91 *L. Ed.* 2d at 77; *State v. Federico,* 198 *N.J.* Super. 120, 128-29 (App. Div. 1984) (the elements distinguishing the degrees of the crime of kidnapping must be determined by the jury and not the judge to avoid undermining a defendant's constitutional due process rights), *aff'd,* 103 *N.J.* 169 (1986) (affirming on statutory construction grounds; the Court expressly did not determine whether the result is "compelled by either the United States or New Jersey Constitutions"); *see also State v. Anderson,* 127 *N.J.* 191 (1992) (provision in the Code of Criminal Justice that materiality in a prosecution for perjury is a matter of law for the judge to determine is a violation of the New Jersey Constitution because materiality is an element of the crime).

Further, in New Jersey "motive traditionally has been an important factor for judges to consider at sentencing." *Mortimer, supra,* 135 *N.J.* at 528. Here, as in *McMillan,* the State has taken a sentencing factor, the motive for the crime, and prescribed the weight to be given it. *See* 477 *U.S.* at 89-90, 106 *S. Ct.* at 2418, 91 *L. Ed.* 2d at 79.

Numerous cases have held that sentencing factors do not have to be established beyond a reasonable doubt. *See State v. Biegenwald,* 106 *N.J.* 13, 59 (1987) (ordinarily, the State's contentions at a sentencing proceeding need not be proven beyond a reasonable doubt, even those that are statutorily prescribed); *State v. Smith,* 279 *N.J.* Super. 131, 139 (App. Div. 1995) (the State need not prove beyond a reasonable doubt grading provisions which do not constitute elements of the offense); *see also* Graves Act, *N.J.S.A.* 2C:43-6(c) (upon a judge's finding by a preponderance of

the evidence that a defendant used or possessed a gun while committing certain crimes, a sentence of three years without parole must be imposed); *State v. Des Marets*, 92 *N.J.* 62 (1983) (the Graves Act does not unconstitutionally infringe upon the judicial power to suspend sentences); *cf. Wisconsin v. Mitchell*, 508 *U.S.* 476, 490, 113 *S. Ct.* 2194, 2202, 124 *L. Ed.* 2d 436, 448 (1993) (a penalty enhancement statute for race-based selection of a victim was not unconstitutional, overbroad or violative of free speech); *State v. Cotella*, 298 *N.J.* Super. 668, 675-76, 690 A.2d 156 (App. Div. 1997) (upholding an extended sentence imposed under the Hate Crime Statute).

The New Jersey Hate Crime Statute does expose the defendant to "greater and additional punishment" and therefore the defendant's claim has "superficial appeal." *See McMillan, supra*, 477 *U.S.* at 88, 106 *S. Ct.* at 2417, 91 *L. Ed.* 2d at 78. However, this one factor standing alone does not place the statute on the "impermissible side of the constitutional line." *See id.* at 91, 106 *S. Ct.* at 2419, 91 *L. Ed.* 2d at 79. Court decisions have consistently upheld the constitutionality of statutes containing sentencing factors which impose a greater or additional punishment. In *United States v. Rumney*, 867 *F.*2d 714, 717 (1st Cir.), *cert. denied*, 491 *U.S.* 908, 109 *S. Ct.* 3194, 105 *L. Ed.* 2d 702 (1989), the court held that the heightened penalty provided by the Armed Career Criminal Act ("ACCA") 18 *U.S.C.* § 924(e)(1), for persons who possess a firearm "after having been thrice convicted of burglary/robbery is a sentence enhancer [not] a substantive crime." Virtually all of the other federal courts of appeal have reached the same conclusion. *E.g., United States v. McGatha*, 891 *F.*2d 1520, 1524 nn. 27, 29 (11th Cir.) (noting

that all the federal circuit courts of appeal except the second and fifth circuit have held that the ACCA does not create a new offense but is merely a sentence enhancement provision), *cert. denied*, 495 *U.S.* 938, 110 *S. Ct.* 2188, 109 *L. Ed.* 2d 516 (1990); *but see United States v. Davis*, 801 *F.*2d 754 (5th Cir. 1986); *see also United States v. Palacios-Casquete*, 55 *F.*3d 557 (11th Cir. 1995) (agreeing with four and disagreeing with one federal circuit courts of appeal by holding that a criminal statute regarding deported aliens remaining unlawfully in the United States is a sentence enhancing statute as opposed to a statute defining a separate crime).

The merits of hate crime statutes have been widely recognized. Most of the states have enacted hate crime statutes which provide for enhanced sentences for bias crimes. *See* Craig P. Gaumer, *Punishment for Prejudice: A Commentary on the Constitutionality and Utility of State Statutory Responses to the Problem of Hate Crimes*, 39 *S. D. L. Rev.* 1, 9 & n. 39 (1994) (noting that as of 1994, twenty-nine states had enacted Hate Crime Statutes which were "essentially" sentence enhancement statutes).

In *Mortimer, supra*, the Supreme Court stated:

> [t]he Legislature can surely treat bias-motivated offenses with an enhanced level of severity, because bias crimes, by nature, have distinct harmful effects. As the Supreme Court has noted, "bias-motivated crimes are more likely [than other crimes] to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest." Therefore, a regulation providing harsher penalties for bias-motivated crimes is appropriate as a

> means of addressing the greater harm those crimes cause.
>
> Thus, we hold that subsection d does not violate the First Amendment. The statute neither regulates protected expression *nor impermissibly punishes motive.*

[135 *N.J.* at 529 (citation omitted) (emphasis added).]

In providing for enhanced sentencing in crimes motivated by racial bias, the Legislature has not trespassed on the fundamental element of criminal intent. The requisite criminal intent for this defendant's crimes has been established by his plea of guilty, namely, (1) having a firearm in his possession "with a purpose" to use it unlawfully against the person or property of another, *N.J.S.A.* 2C:39-4(a); and (2) "knowingly" having in his possession a destructive device. *N.J.S.A.* 2C:39-3. Motive is quite different from intent. " . . . *[M]otive* is the inducement for doing an act; the *intent* is the resolve to commit an act." Stated differently, *motive* relates to the end; *intent* relates to the means. Bryan A. Garner *A Dictionary of Modern Legal Usage* 458 (2d Ed. 1995).

In *Morss v. Forbes*, 24 *N.J.* 341, 359 (1957), the Court said that intent should not be "confused" with motive and "proof of motive is never essential to a conviction but may be evidential." In *Snakenberg v. Hartford Casualty Ins. Co.*, 383 *S.E.*2d 2, 7 & n. 7 (S.C. Ct. App. 1989), the court said: "purpose relates to the result desired by the actor; motive is his subjective reason for desiring the result." *See also* 21 *Am. Jur.* 2d *Criminal Law* § 173 (1981) ("In criminal law motive may be defined as that which leads or tempts the mind to indulge in a criminal act, or as the moving power which impels to action for a definite

result. Motive is distinguishable from intent, which is the purpose to use a particular means to effect a certain result. Motive is not an essential element of any crime, unless made so by statute.")

The parties have not cited and our legal research has not uncovered any case in which the motive for the crime when used solely as a sentencing enhancer or factor is transformed into an element of the crime which then must be established beyond a reasonable doubt. The modern trend in the law is in the opposite direction. Sentencing judges are being given more discretion to engage in factfinding regarding the circumstances of the crime. As stated in a law review article:

> Under real-offense sentencing systems, [sentencing] judges are given spacious authority to determine an offender's "real" crimes. . . .
>
> The United States Constitution, as currently interpreted, imposes virtually no restrictions on the practices of real-offense sentencing. Any constitutional constraints that might be imagined by lawyers or academics would require the making of "new Law," and the present Supreme Court has given no signals of movement in that direction. Indeed, the few major rulings handed down by the Court Have uniformly given the states wide latitude in structuring their laws concerning factfinding at sentencing.

[Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 *Stan. L. Rev.* 523, 542 (1993); *see also* Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 *U.C.L.A. L. Rev.* 1179 (1993) (criticizing real offense sentencing and *McMillan*); Susan N. Werman, *The Tail that Wagged the Dog:*

Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process, 66 *S. Cal. L. Rev.* 289 (1992) (same).]

We recognize that in a given case, a draconian statutory sentencing mandate based upon a finding of motive reached only by a preponderance of the evidence could infringe on a defendant's due process rights. However, we are also mindful that an act of the Legislature should not be lightly cast aside. Legislatures "are guardians of the liberty and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas & Texas Railway Co. v. May*, 194 *U.S.* 267, 270, 24 *S. Ct.* 638-39, 48 *L.Ed.* 971, 973 (1904) (Holmes, J.). Further, "every possible presumption favors the validity of an act of the Legislature." *New Jersey Sports & Exposition Auth. v. McCrane*, 61 *N.J.* 1, 8 (1972). We are satisfied that this statute falls on the permissible side of the constitutional line. *See McMillan*, *supra*, 477 *U.S.* at 91, 106 *S. Ct.* at 2419, 91 *L. Ed.* 2d at 79.

In sum, if a person is convicted of a crime by a plea of guilty or by proof beyond a reasonable doubt, we find no constitutional impediment to a statutory requirement for an extended term upon the sentencing judge being satisfied by a preponderance of the evidence that the crime was committed because of racial hatred.

Affirmed.

I hereby certify that the
foregoing is a true copy
of the original on file in
my office.

/s/ R. Emille Cox
Clerk

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CUMBERLAND
COUNTY
IND NO. 95-01-46
A.D. #1587-95-T4

STATE OF NEW JERSEY, Plaintiff, vs. CHARLES APPRENDI, JUNIOR Defendant.	TRANSCRIPT OF MOTION AND SENTENCING

Place: Cumberland County
Courthouse
Broad and Fayette Streets
Bridgeton, New Jersey

Date: September 29, 1995

BEFORE:

THE RUSHTON H. RIDGWAY, J.S.C.

TRANSCRIPT ORDERED BY

JOSEPH D. O'NEILL, ESQ.

APPEARANCES:

ROBERT J. LUTHER, First Assistant Prosecutor
Attorney on behalf of the State of New Jersey

JOSEPH D. O'NEILL, Esq. Attorney on behalf of the Defendant

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Sound-Recorded Proceeding
Recording Operator, Joan Tuthill

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Colloquy

[p. 3] THE COURT: All right, Mr. O'Neill.

MR. LUTHER: Judge, excuse me. If I can suggest – there's a motion and there's sentencing. And the State has a witness it wants to call for purposes of the motion. Perhaps we can proceed by calling the witness first and then proceeding forward?

MR. O'NEILL: Well, I was unaware of this, Judge. May we know the identity of the witness so I can know whether I should object or not?

MR. LUTHER: Judge, at the time of September 5 when Mr. O'Neill called witnesses, I told the Court then that I was going to call Mr. Fowlkes as a witness for the motion.

THE COURT: I think you did. He wasn't available at the time, I think, wasn't he?

MR. LUTHER: Well, no, the original understanding of the State was that the motion was going to be heard on the day of sentencing. Mr. O'Neill proceeded with witnesses on the motion on September 5. I told the Court at that date that I was going to call Mr. Fowlkes for purposes of the motion.

THE COURT: Very well.

MR. LUTHER: Thank you, Judge.

I call Michael Fowlkes at this time.

THE COURT: You come up here, Mr. Fowlkes. Come around.

Is the Bible over there?

M. Fowlkes – Direct

[p. 4] THE CLERK: Yes, it is, Your Honor.

THE COURT: All right. You want to place your left hand on the Bible and raise your right?

MICHAEL DAVID FOWLKES, WITNESS, SWORN

THE COURT: And your full name is?

THE WITNESS: Michael David Fowlkes.

THE COURT: Very well. Have a seat.

DIRECT EXAMINATION BY MR. LUTHER:

Q. Good morning, sir. Could you tell the Judge your name, please?

A. My name is Michael David Fowlkes.

Q. And where do you live, sir?

A. I live at 5211 East Chestnut Avenue.

Q. And what city is that in?

A. Vineland, New Jersey.

Q. And how close is that to Atlantic County?

A. That is approximately 25 to 35 yards.

Q. From Atlantic County?

A. From Atlantic County.

Q. So you're just at the very edge of Cumberland County then?

A. Correct.

Q. And is it about two miles east of Lincoln Avenue in the City of Vineland?

A. Yes, it is.

[p. 5] Q. Okay. Sir, when did you move into 5211 East Chestnut Avenue?

A. July 28th, 1994.

Q. Was that the settlement date?

A. Yes, it was.

Q. Were you fully moved in on that date or no?

A. Correct. Yes, we were fully moved in.

Q. Okay. Let me see. Did you – prior to December 22nd of 1994, did you know an individual by the name of Charles Apprendi?

A. No, I did not.

Q. When is the first time that you even saw Mr. Charles Apprendi?

A. The first time that I saw Charles Apprendi was the morning of December 23rd. I'd say it was 4:32 a.m. And me and my wife was riding – went down – down the block heading west. And we seen the police officers putting Charles into the car.

Q. Okay. And do you see that person in court today?

A. Yes, I do.

Q. And could you indicate where he is?

A. That's him, right there.

Q. Okay.

THE COURT: All right. Let the record reflect that he's pointed to Mr. Apprendi.

DIRECT EXAMINATION BY MR. LUTHER:

[p. 6] Q. Sir, you said it was December 23rd of 1994. Was it the morning right after your house was shot at?

A. Correct.

Q. Okay. Was – do you recall if that was December 22nd, 1994?

A. I'm not positively sure on the dates. It was either the 22nd or the 23rd. And the reason –

Q. Okay.

A. – that it was confusing – because of the a.m. and p.m. switch.

Q. Right; okay. Sir, how long had you been saving up to buy the house on 5211 East Chestnut?

MR. O'NEILL: Objection; irrelevant.

THE COURT: Prosecutor, is it relevant?

MR. LUTHER: Well, I just wanted to know how long he had been –

THE COURT: I'm going to sustain the objection.

MR. LUTHER: All right.

DIRECT EXAMINATION BY MR. LUTHER:

Q. Sir, between August of '94 and December of '94, were yourself and your family frequently outside your house?

A. Correct.

Q. And could you just briefly tell me about that?

A. Well, me and my son like to do yard work. We would – we would – we were putting shrubs in, cleaning up brush, setting [p. 7] up firewood, setting up our dog pens for our dogs, different, et cetera, things that you – you do around your yard.

Q. Okay. Sir, although it's obvious, could you tell – for the purposes of the record, what color are you?

A. I am a black American.

Q. Okay. And are you married?

A. Yes, I am.

Q. And what's your wife's name?

A. My wife's name is Mattie.

Q. And what race is she?

A. She is a black American.

Q. Okay. Do you have any children?

A. Yes, I do.

Q. How many?

A. I have three children.

Q. And what are their names and ages?

A. My oldest son is Philip Fowlkes. He is 16. My daughter's name is Dawn. She is 13. And my younger son's name is Michael, Junior. And he is 9.

Q. Okay. Were they living with you at 5211 East Chestnut from August, '94 through December of '94?

A. Yes, they were.

Q. Okay. Sir, east of Lincoln Avenue on Chestnut in the City of Vineland, to your knowledge are you the only black family that lives in that area?

[p. 8] A. Correct.

Q. Are you familiar with another family that has a wagon wheel in the front of the house?

A. Yes, I am.

Q. And what race are they?

A. They are white.

Q. All right. Sir, are you familiar with the location of Mr. Apprendi's home?

A. Yes, I am.

Q. And approximately how far is it from your house?

A. I would take a guess it's between five to eight-tenths of a mile.

Q. And is that east or west of your home?

A. That is west of my home.

Q. Okay. And do you also know where the Greek Island Restaurant is in the City of Vineland?

A. Yes, I do.

Q. And is that east or west of your home?

A. That is west of our home.

Q. Do you know what road that's on in Delsea (sic) – in Vineland?

A. That is on Delsea Drive.

Q. Okay.

A. Delsea and Sherman, to be – be in the approximate area.

Q. All right. Sir, how far back does your house sit [p. 9] from the roadway?

A. It is approximately a-hundred-and-eighty-foot driveway.

Q. Okay. And that's a-hundred-and-eighty-feet back from East Chestnut Avenue?

A. Correct.

Q. Sir, directing your attention to late September of 1994, could you tell the Court just briefly about what, if anything, unusual happened on that date?

A. Could you repeat the question, please?

Q. Sure. Late September of '94, sir, if you could just briefly tell the Court anything unusual that happened at your home.

MR. O'NEILL: Judge, I object. It's not really relevant here because we're here for sentencing. The defendant has pleaded guilty to that crime. There's no need to prove it again.

THE COURT: I think it's connected with the motion for an extended term. And I'll permit it.

The objection's overruled.

MR. LUTHER: Thank you.

DIRECT EXAMINATION BY MR. LUTHER:

Q. Sir, if you could just tell the Court briefly what, if anything, unusual happened in late September at your residence.

A. On late – in September, late September, our home was shot [p. 10] at. On a Saturday morning was when we first noticed that there was a bullet hole in – in my top kid's room –

Q. Okay.

A. – through – through the glass, pane glass.

Q. And how many stories is your house?

A. Three stories.

Q. All right. And what story was the bullet hole on?

A. The third.

Q. All right. Whose room was the window in?

A. That was my younger son, Michael, the 9-year-old.

Q. All right. Was he in his bedroom that evening?

A. Correct.

MR. O'NEILL: I'm going to object, Judge. I think this is prejudicial. It's really meant to inflame the Court. And I think it's improper. The fact that the bullet was discharged, the fact that the defendant pleaded guilty to it, has nothing whatever to do with who was in the room at what time or what have you.

THE COURT: I'm going to overrule the objection.

Go ahead, Mr. Luther.

MR. LUTHER: Thank you, Judge.

DIRECT EXAMINATION BY MR. LUTHER:

Q. Sir, could you tell us who was in the room that evening?

A. My younger son, Michael, my 9-year-old.

[p. 11] Q. And where was his bed located at that time?

THE COURT: Are you talking about one son or two?

THE WITNESS: One son, sir.

THE COURT: All right.

DIRECT EXAMINATION BY MR. LUTHER:

Q. Okay. And where was his bed located?

A. His bed is located in the middle, three-quarters towards the window. His bed is, I'd say, taking a rough guess, maybe 2 feet from the window.

Q. Okay. Sir, were there also two other incidents in November of this year where your house was shot at?

A. Yes, there were.

Q. And just one bullet in both instances?

A. Correct.

Q. And could you just briefly tell the Court where those bullets were located?

A. The one bullet was located on the east side of the – the house. And – and it was lodged in the siding. The second bullet was located in the middle of the house. And – and – and it was lodged in the stucco.

Q. Okay. Did either of those bullets enter the home?

A. No.

Q. Was anything found in the family room or no?

A. Yes, there was. There was a bullet. In fact, I have to correct that. Yes, the second bullet was lodged in the home.

[p. 12] Q. Okay.

A. And that bullet fragment was found in our family room.

Q. All right. How did that bullet enter the home?

A. It entered through the – the molding on the – on the window frame.

Q. And which room is that?

A. That is the family room.

Q. And what –

A. That is the room below my younger son's room.

Q. And what floor is that on?

A. That is the second floor.

Q. Okay. Is the second floor the ground floor of your home?

A. Correct.

Q. All right. And the first floor – I guess you would call it the lower level?

A. Correct.

Q. All right. Focusing on December 22nd of last year, how many bullets were fired at your home?

A. Eight bullets.

Q. And could you tell the Court about that?

A. Well, it was 1:55 a.m. in the morning. Me and my wife was woken (sic) up by bullet holes, glass shattered. Everything everywhere in our foyer. At that particular time I had ran outside and I ran to the edge of the road. And that – at that [p. 13] time that's when I seen a – a – a gray Chevy truck with a cab make a left turn heading west down Chestnut.

Q. Okay.

A. And at that time my wife had by then called the police.

Q. All right. Could you describe the damage to your home?

A. It – that's going to be a hard one, Robert. And the reason is there was so much damage. The two French doors were bullet-riddled. I had – my stairway that goes up the steps to my – to my upstairs, that was bullet-riddled. Whew. The – the downstairs foyer closet. The frame of the door. There was bullet holes through that. I have a – me and my wife have a moon-shaped window in the front of our foyer. That was bullet-riddled.

Q. Could you describe those doors to the Court, your front doors?

A. They're – they're two French doors. The – three-quarters of the door is glass. I'd say there's 6 inches of frame space there.

Q. And what color is the frame on those French doors?

A. Burgundy.

Q. All right.

THE COURT: And there's 6 inches around the glass part?

THE WITNESS: Yes, the – it's the average –

[p. 14] THE COURT: The frame.

THE WITNESS: Yes, the frame.

THE COURT: The glass has to be held by something.

THE WITNESS: Yes.

THE COURT: And that's – the frame you're talking about is 6 inches. The rest of it's glass.

THE WITNESS: Correct.

THE COURT: And what's the color of the glass? What type of glass is it?

THE WITNESS: Clear.

THE COURT: Clear glass?

THE WITNESS: Yes.

THE COURT: But the frame is burgundy?

THE WITNESS: Correct.

THE COURT: All right.

THE WITNESS: And, Your Honor, I'd like to add to that. On the windows – it was two days before Christmas. And we had put Christmas decorations up. And my wife had put two black Santa Clauses in the middle of the – the glass windows. That was also attached to the doors – to the doors theirself (sic).

DIRECT EXAMINATION BY MR. LUTHER:

Q. Were any of those black Santa Clauses shot by the bullets?

A. Yes, they were.

[p. 15] Q. Okay. The damage to the inside of the house, were there any bullet holes in any walls?

A. Yes, there were.

Q. And where does your daughter, Dawn, sleep?

A. She sleeps on the east side of the house in the back room.

Q. And were there any bullet holes in the opposite side of her bedroom wall?

A. Yes, there were.

Q. Did the bullet actually go into her bedroom or no?

A. No, the bullet did not. I believe that it lodged in the wall.

MR. O'NEILL: Your Honor, I'm going to object to this questioning if it's intended to proceed, because there were four incidents of shooting. There are convictions as to two. Unless the witness can differentiate among them, it's improper, it's prejudicial, to hear testimony as to other than the two for which there has been a conviction.

MR. LUTHER: Judge, I have no further questions.

THE COURT: All right.

Cross-examine.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. Now, Mr. Fowlkes, as to the house with the wagon wheel in front of it, you testified that there are white people living in there; right?

A. Correct.

[p. 16] Q. You don't know, do you, sir, whether there were black people living in there before the white people moved in?

A. No, I do not.

Q. All right. Now, before you moved into that house in August of the previous year, you don't know what black people, if any, lived in the area; do you, sir?

A. Yes, I – I'm pretty familiar, sir, because East Chestnut was the route that I took to my job every day.

Q. Well, the fact that you took that route every day didn't permit you to determine whether the people who

lived in each of those residences were black or white; isn't that so?

A. No, sir, I find that incorrect, because I am a very observant person. And we – and me and my wife's plans were to move to East Vineland. And what we would do, we would ride around and look at property and land and other people's homes and – to find out how our surroundings would be.

Q. If I asked you to identify each of the people by family name who lived on that street during the summer of 1994, could you do it or could you not?

A. I could not.

Q. Thank you.

Now, before the December 22, 1994 date when your house was shot, your wife had told the police that she believe that the previous shootings were racially motivated; isn't that true?

[p. 17] A. No, that is not.

Q. Would you be surprised to learn, sir, that in a report of November 14, 1994 by the Vineland Police Department, there is included a statement by your wife that she felt that the shootings were racially motivated? Would that surprise you?

MR. LUTHER: Judge, I'm going to object at this point at to whatever his wife said. It's not on the scope of direct exam.

MR. O'NEILL: It doesn't have to be, Judge, to this issue.

THE COURT: I'm going to permit it.

The objection's overruled.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. Would that surprise you, sir?

A. Could you repeat –

Q. Sure.

A. – the question?

Q. Would it surprise you to learn that in a supplementary report of the Vineland Police Department of November 14th, 1994, there is a statement attributed to your wife that the previous shootings were racially motivated?

A. Well, Joseph, I have to take a no-comment on that, because I was not there and I did not witness or hear my wife say anything to the – to that statement that you just said.

[p. 18] Q. Before December 22 of 1994, you and your wife, no doubt, discussed the previous shootings; isn't that so?

A. Yes, that is.

Q. Okay. And during at least one of those conversations didn't your wife tell you, "Michael, this is the product of racial motivation" –

A. No.

Q. – or something to that effect?

A. No, she did not, Joseph.

Q. Are you telling this Judge, Michael, that at no time before December 22 of 1994 did your wife tell you or did you mention to your wife that the previous shootings were racially motivated?

A. No, I did not.

Q. Did your wife mention to you that on November 6th of 1994 she had spoken with members of the Vineland Police Department?

A. Sir – Joseph, there were so many numerous officials that we talked to, I do not remember every specific individual that she talked to.

Q. Now, I know that –

A. People were coming in and out of the home.

Q. Well, I know that you and your wife are close, 'cause you and I know each other.

I want to ask you this, sir: On each of the [p. 19] occasions that you or your wife talked to the Vineland Police about this or these incidents, you discussed it with your wife; didn't you?

A. Yes, I did.

Q. All right. And what you're telling the Judge is that you don't know whether or not your,wife indicated these were racially motivated before December 22?

A. That is correct.

Q. All right. Now, the front door is, I think you said, a burgundy or purplish-reddish-brown-type of color?

A. No purple, no reddish. The door is burgundy.

Q. Well, burgundy is a sort of reddish-brown; is it?

A. That might be your interpretation.

Q. Well, give your interpretation.

A. Well, mind is it's burgundy, period.

Q. Well, what do you mean by burgundy?

A. The color burgundy.

Q. What – how would you describe that color?

A. As burgundy.

Q. Okay. If you were asked by the Judge, as I am asking you now, to tell us how to describe the color you have identified as burgundy, how would you describe it?

A. Well, I would –

THE COURT: Burgundy. He said burgundy.

MR. O'NEILL: I know. I'm trying to find out what it [p. 20] means to him.

THE WITNESS: I would address Your Honor and say that the color would be burgundy, period.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. Whatever that is to you; right?

A. Correct.

Q. All right. Now, either you or your wife had an evaluation of property damage done to your house by Vaness (sic) Construction, is that correct – or Naness Construction?

A. Correct.

Q. All right. And you know that Naness has attributed to the shootings damage totaling some $6,085; right?

A. Correct.

Q. Did either you or your wife tell anybody in probation or the police or the Prosecutor's Office that you had insurance to cover that damage, absent of a $500 (sic) – or a $350 deductible?

A. Well, I cannot comment on that, because my wife takes care of the – mainly the paperwork and stuff at our house, sir. So, no, we didn't discuss anything like that.

Q. So, in other words, if your wife admitted that there was a $350 deductible and insurance took care of the balance of the damage, you wouldn't disagree with that; would you?

A. Well, that's a hypothetical question, Joseph. I really don't know. And, once again, I say no comment on that.

[p. 21] Q. You mean you can't answer the question; right?

A. I cannot answer the question.

Q. All right. As a matter of fact, Michael, you can't tell this Judge what damage was done to your home on September 24 or December 22 of 1994; can you?

A. That's incorrect, Joseph.

Q. Well, how can you differentiate? And I want you to answer this if you can. How can you differentiate what

damage was done to your house on either September 24, December 22, November 6th or November 8th?

A. The reason I can tell that – because I can physically see the damage.

Q. Can you tell this Judge what damage was done on either of those four particular dates?

A. Yes, I can tell His Honor that.

Q. Would you differentiate among them?

A. Okay.

Q. Tell us first what damage was done on November 8 of 1994.

A. Could I have the two – the two dates, 'cause I –

Q. November 8 of 1994, Michael. What damage was done to your house on that date?

A. Joseph, for me to answer that question I would need to know does that (sic) two dates in November that the shooting was. Because I know exactly what happened on the first [p. 22] shooting in November and I know exactly what happened on the second shooting in November.

Q. Well, Michael, are as you sure of the second and third shooting dates as you were of the fourth shooting date which you identified earlier today as December 23 of 1994?

A. I'm not positively sure on the dates. But I am positively sure on the month.

Q. Well, if you're not positively sure of the dates, you cannot, can you, tell His Honor what damage was

done to your home on any of those four specific dates; can you?

A. Joseph, I can tell the damage, not the dates.

Q. You can't tell what damage was done on any of those four dates; can you?

A. Yes, I can.

Q. Would you tell us, as I asked you before, what damage was done on November 8 of 1994?

A. And I would tell you – like I asked you before, if you could tell me the two separate dates in November, I can tell you what day that the damage happened on that date.

Q. Sir, all I'm asking you is to tell His Honor what damage was inflicted on your house on November 8. Yes or no, can you tell us?

A. And all I'm asking you, Joseph, is that I need the two dates to difference (sic) the damage that was done on each previous date.

[p. 23] MR. O'NEILL: Your Honor, would you instruct the witness to answer the question?

THE COURT: He says he can't do it without the information.

MR. O'NEILL: All right.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. Let me ask you this: If I say to you, sir, that you allege that there was damage, even though you can't remember, apparently – there was damage on November

6th and November 8 of 1994, what damage was done on November 6th, if you can't answer as to November 8th?

A. Joseph, you know, you're –

Q. Can you answer the question, sir?

A. Yes, I can answer the question.

Q. Please do so.

A. Can you repeat the question, please?

Q. Yes. Tell His Honor and the rest of us what damage was inflicted on your house on November 6th of 1994.

A. Okay. And, once again, I ask you: Can you tell me what the other date in November was? That way I can disreate (sic) between the shootings.

Q. I already did that, Michael. It was –

MR. LUTHER: Judge, they were November 6th and November 8 of '94.

THE COURT: Those are the two dates.

[p. 24] MR. O'NEILL: I already told him that.

THE WITNESS: Okay; thank you, Your Honor.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. I already told you that, Michael.

A. November 6th, the damage on the house was a shot to the east side of the home on – on the-stucco; okay? And – and the later date was the frame in the family room window.

MR. O'NEILL: Judge, may I have this report submitted and marked as D-1 for identification?

THE COURT: Fine.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. All right. Michael, I show you what has been marked as Defense Exhibit D-1 for identification and ask you to look at it. Now, do you see where it says, "Item Number 1?" Do you see that?

A. Correct.

Q. Okay. That was the report that was rendered to you by Naness Construction, Inc.; right?

A. On – on December – after the December 22nd shootings, this – this full estimate is from the – the major shootings, from –

Q. Well, –

A. – the eight bullets.

Q. – specifically it says, "January 31 of 1995;" doesn't it? That's the date on it; right?

[p. 25] A. Correct.

Q. Okay. Now, can you tell His Honor what date – on what date the damage was done as to Item 1?

A. That – that was done December 22nd, 1994.

Q. Now, let me ask you, sir: What damage was done on – or what date was the damage done as to Item Number 6 indicated here?

A. That's (sic) was done on November –

Was it the 2nd, Robert?

Q. Well, you can't ask another person in the audience to answer your question.

A. That was done on November 2nd, right there, Joseph.

Q. All right. If I say to you, sir, that the police reports do not indicate that there was any shooting on November 2nd, 1994, would that surprise you?

A. Yes, it would.

Q. Thank you.

MR. LUTHER: Judge, the witness has already indicated he doesn't remember the dates and has to be supplied the dates.

MR. O'NEILL: Well, he was supplied the dates –

THE COURT: All right. Let's not – let's not –

MR. O'NEILL: – by both –

THE COURT: Mr. O'Neill, let's not argue. Let's continue with the questions.

MR. O'NEILL: I think that we've shown enough, Judge.

[p. 26] Thank you. No further questions.

THE COURT: Any redirect?

REDIRECT EXAMINATION BY MR. LUTHER:

Q. Sir, do you still have bullet holes in your home?

MR. O'NEILL: That's irrelevant, Judge, whether they're repaired or not.

THE COURT: Sustained.

MR. LUTHER: Nothing further, Judge.

THE COURT: All right. Mr. Fowlkes, you can step down. Thank you.

THE WITNESS: Thank you, Your Honor.

THE COURT: All right, gentlemen. Any other testimony to be taken on the issue of the extended term?

MR. LUTHER: No, Judge.

THE COURT: All right. Do you gentlemen want to be heard?

MR. O'NEILL: Well, I do, Judge.

THE COURT: Okay.

MR. O'NEILL: If Your Honor pleases, the criteria for sentencing to an extended term under N.J.S.A. 2C:44-3(e) is invalid because it's based on proof required by the statute by a test or a standard known as by a preponderance of the evidence.

Now, we've briefed this, Judge. We've submitted three briefs. And the essence of the briefs is simply this;

Colloquy

[p. 27] that traditionally in the criminal law all essentials need to be proven by the State. Must be proven by not a preponderance of the evidence, as is indicated in the statute, but by the time-honored going through English and American history standard of proof beyond a reasonable doubt.

Now, there is a case of *State versus Des Marets* on 92 New Jersey, Page 62. That has to do with the Graves Act. And Your Honor is familiar with that case. And it says – written by Chief Justice Wilentz – that there's only a showing required of possession of a firearm by a preponderance of the evidence.

Now, that is very distinctfully (sic) different from our case here because, as Chief Justice Wilentz stated at Page 69 of his opinion, that the statute itself strongly suggests that the actor's state of mind was meant to be irrelevant. The quote, Judge, is – strongly suggests that the actor's state of mind was meant to be irrelevant.

Now, that's very, very different from what confronts the Court here today. Because the *mens rea* or the guilty intent is absolutely required to be proven before the Court can determine whether or not a crime committed was racially biased or racially motivated. The specific intent of the defendant is required to be proven contrary to *State versus Des Marets*, where there was no intent required to be proven beyond a reasonable doubt because the actor's state of mind, the [p. 28] defendant's state of mind, in the words of the Chief Justice, was meant to be irrelevant.

Here, you can't decide this case unless you can decide what was in the mind of this defendant at the time he committed those two crimes. And that has to be not by a mere preponderance of the evidence, not by clear and convincing evidence, but by the time-honored standard of proof beyond a reasonable doubt.

That's the difference here, Judge. It requires you to assess in this case the mental state, the intent of the defendant. Before you can determine whether the Prosecutor has proved what he must prove for the Court to sentence this man to an enhanced penalty, he's got to prove beyond a reasonable doubt that there was racial motivation involved in the activities engaged in by this defendant.

And I can go on and on and on. But I think as stated in our briefs, Judge, encapsulated, that's what the position of the defense is as to the standard of proof. That statute is wrong. It's invalid. It can't be used in this case.

MR. LUTHER: Judge, just briefly on the issue of whether or not the statute is constitutional. Again, I've already submitted a brief. But beyond a reasonable doubt only applies to elements of a crime. It does not apply to sentencing provisions.

The Supreme Court in *State versus Mortimer* addressed [p. 29] identical language in the bias harassment statute and found it to be constitutional with certain language excised. And as detailed in my brief, the State respectfully submits that certain language be removed from the extended term statute in accordance with the Supreme Court's ruling in *State versus Mortimer.* As such, the statute would be constitutional.

Would the Court also wish to hear argument at this time as to why an extended term should be granted?

THE COURT: Certainly.

MR. LUTHER: Okay. Judge, first let me just deal briefly with the defendant's arguments. The defendant contends that he did not act out of racial bias. But, rather, says that he was drunk and under the influence of drugs.

Now, first of all, Judge, this completely contradicts what he told the police. He told the police when he was arrested that he was not under the influence of drugs and that he was not drunk. He had taken some over-the-counter medication for his stomach, I believe. And he had taken – had one or two drinks at the Greek Island Restaurant between 10:30 and midnight. That's what he told the police that evening. He did not appear drunk.

And then on September 5 of this year he testified under oath that he was under the influence of drugs and also drinking. However, he said that the last drugs he took that night were at 8 p.m. He spoke with the police at 6 a.m. And [p. 30] he admitted that he acted out of racial bias. That's ten hours after he took [t]he drugs. He admitted that his last drink was at 1:30 in the morning. That's four-and-a-half hours before he spoke with the police. So I would submit that the evidence is clear that he was not drunk or under the influence of drugs.

Also, Judge, you have to look at the purposeful and planned nature of his conduct. Judge, if I could just show the Court the rifle that Mr. Apprendi used that evening. It wasn't just a regular rifle, Judge. He had a homemade

silencer attached to the end of it. And not only did he have a homemade silencer, but he had a scope, as well. This scope is what he referred to as a toy in his testimony. He also called the silencer a toy when he testified before this Court.

Judge, this is not just an ordinary scope on a rifle, it's a laser scope. And if the Court would look at the wall over there, I've got the scope on right now. There's a red laser beam which is on the wall of the court showing that this type of weapon is deadly accurate. And I would submit that this shows that this defendant was not drunk or under the influence of drugs when he was firing it repeatedly at the Fowlkes residence on December 22nd, 1994. He knew exactly what he was doing.

MS. FOWLKES: Amen.

MR. LUTHER: He had the silencer on the gun to avoid apprehension.

[p. 31] MR. FOWLKES: Uh-huh.

MR. LUTHER: He had the scope on the gun to make sure that he hit his target. And hit his target, he did, repeatedly. Numerous shots going through the front door of the home, including hitting the black Santa Clause [sic] which was on that front door.

Judge, the defendant says there was no racial animous (sic) here. He was just driving by the home and the purple door caught his attention. That's what he tells the Court; okay?

First of all, Judge, the door's not purple; it's burgundy. But even if the Court thinks burgundy is similar to purple, the more important point is that most of that

door was glass. There was only a 6-inch wooden border around that door; okay? The door and the house sits a-hundred-and-eighty-feet from the roadway. So what was it that Mr. Apprendi saw on that door that caught his attention? Judge, it wasn't the color purple. It was that black Santa Clause [sic] on the door that caught his attention.

The defendant contends he doesn't walk around making racist statements. Therefore, the State hasn't proven he acted with racial bias. Judge, most racists don't walk around making racial statements all the time.

More importantly, the State doesn't have to prove a history of racism. Rather, the State just has to prove that [p. 32] the criminal acts that this defendant committed were done with the purpose to intimidate based on race. And I think the State clearly has met that burden.

One other point raised by the defense. The defense called Dr. Cooke. Dr. Cooke testified that the defendant is easily led and just said what (sic) the police – just said to the police what they wanted to hear. Judge, he had four shootings here. The defendant only admitted to two of them to the police. So if Dr. Cooke's testimony is to be believed, then this defendant would have admitted to all four of the shootings.

Judge, I think the evidence overwhelmingly shows that the only possible motive for this crime was that he acted out of racial bias.

First of all, in this case – most cases the State does not know the intent of the defendant. Most cases the State doesn't know that.

This case is different. The defendant told us why he did what he did. He admitted to the police – he said, "Look, nothing personal against the Fowlkes. I don't even know them. The reason I did this is because they're black and I don't want blacks in my neighborhood." So this defendant admitted the reason why he committed this crime.

The Fowlkes family is the only black family east of Lincoln Avenue in the City of Vineland. That's a two-mile [p. 33] stretch on Chestnut Avenue where both Mr. Apprendi and the Fowlkes resided. Mr. Apprendi said when he testified that he was only aware of one other family – one family, period, on East Chestnut Avenue that was black. He thought their name was the Lakes. He described the house as having a wagon wheel in front.

And Mr. Fowlkes just testified that the family that resides there is a white family.

More importantly, when Mr. Apprendi spoke with the police he admitted that he knew that black people lived at that residence that he fired at. And the reason he knew this was because he had frequently seen them out in the yard prior to the shooting. So that, therefore, he knew that a black family resided at that address.

Mr. Fowlkes just corroborated that testimony in his testimony this morning, indicating that frequently he and his children would be outside the home.

Mr. Apprendi claims this was not racially motivated. Judge, very importantly, this was not an isolated incident. This happened more than once. Was it just random chance happening over and over again that the Fowlkes

family just happened to be fired at by Mr. Apprendi? I don't think so, Judge. I think it's clear that the reason was racially motivated.

Finally, Judge, you have the black Santa Clause [sic] which [p. 34] was on the door. It's pretty clear, Judge, that that was the target that Mr. Apprendi was shooting at on December 22nd. December 22nd is the count which is subject to the motion for extended term. Not only was he shooting at that black Santa Clause [sic], Judge, but Mr. Fowlkes testified that the bullets actually hit that black Santa Clause [sic].

Judge, frankly, there's no other reasonable explanation why Charles Apprendi, who did not know the Fowlkes – the Fowlkes did not know him – why he would repeatedly fire at their home. There's just no credible, rational reason, other than they were black. And, as Mr. Apprendi said, he wanted to send them a message that he did not want them in their (sic) neighborhood – in his neighborhood. Excuse me.

THE COURT: Mr. O'Neill.

MR. O'NEILL: If Your Honor pleases, if I may, I'd first like to treat the issue which first confronts the Court here today, that raised by the Court, that as to the standard of proof required of the prosecution before the Court could consider applying a racially motivated or bias to a crime so as to enhance the sentence.

Now, I invite the Court's attention to the Supreme Court decision in *State versus Biegenwald*, which appears at 106 New Jersey 13, decided in 1987. And specifically at Page 59 of that opinion, the Supreme Court construed the

statutory language pertaining to weighing aggravating and mitigating [p. 35] factors. And that's what we're doing here, Judge, as you know better than I, in sentencing somebody. Before the Court can sentence someone, you have to consider – as, again, you know much better than I – the weight of the aggravating and mitigating factors.

In dealing with that issue which is again before you today, the Supreme Court said in *Biegenwald* that the Supreme Court Approached the construction of the statutory language, quote, "With a long-standing practice in the criminal law of this State that the State has the burden to prove that element beyond a reasonable doubt."

Judge, if you look at *Des Marets* and acknowledge as Chief Justice Wilentz did at Page 69 that the statute itself, quote, "strongly suggests that the actor's state of mind was meant to be irrelevant" – so the argument by the State that they don't have to prove beyond a reasonable doubt that there was racial motivation is bogus. I think the Court has to be bound by the Supreme Court's decision. The Supreme Court made that differentiation in stating very clearly that in *Des Marets* the state of mind of the defendant was irrelevant.

In this particular case, the *mens rea*, the state of mind of the defendant, is not just relevant, it is essential so as to be evaluated by the Court.

So, therefore, the statute is wrong. It flies in the face of the law. In fact, New Jersey Rules of Evidence, [p. 36] 101(b)1, in defining what constitutes burdens of proof, it

indicates on Comment 7 that, "In criminal case the standard comprehended by this rule is that of, quote, 'beyond a reasonable doubt.' "

Judge, going back to long before the colonists wrote up the laws, long before the courts of yore decided cases in the State, coming down through the Blackstone tradition, the burden of proof on the State is to prove anything involving the mind of a defendant. The reasons why he or she did something always must be proved beyond a reasonable doubt.

And that's what they have to prove here today. They haven't done it.

Now, let's talk about the facts of this case, Judge.

The Prosecutor grandly brought out this rifle and pointed out to all of us that it has a laser beam on it. Now, if the defendant wanted to harm these people with a laser beam he certainly could have done so. He didn't have to do so in the wee hours of the morning of (sic) any of those dates. He could have done so in the daylight where the laser beam could have directed his rounds, his cartridges, into the bodies of any one of these poor victims. He didn't do that. Doesn't that really suggest that there's not a reason behind what he did to harm somebody? It's something inexplicable as to normal people. This man is not a normal person. We have uncontroverted testimony by Dr. Cooke, the professor at the [p. 37] University of Pennsylvania, that he has problems. He has problems forming judgments. He makes mistakes as to judgment. He does it because this is the way he thinks. He needs therapy. He needs treatment. Now, when you combine

that preexisting condition of his mind with the synergistic or intertwining of facts of alcohol and drugs, then you have a worse situation for a man, as this man is, who has problems with judgment.

Now, let's talk about, for a few minutes, if the Court will indulge me, as to what happened on the morning of this December 22 of last year. We have a situation where Dr. Cooke has already testified and written in his report that this man, with this type of mind that has, is much more likely to be coerced, to be led into saying things that he does not believe. That remains uncontroverted. There was no report submitted by an expert for the State. There was no testimony produced by the State to be at odds with that opinion uttered by Dr. Cooke.

The testimony was that this man, after imbibing in alcohol and drugs over many, many hours, did a very foolish thing, albeit a criminal thing, a wrong thing to do. But in sentencing this man the Court must look at all of the circumstances. In the words of the Court, the totality of the circumstances. It's not enough to say, to hear, to read, that a house was damaged. It's not enough to say a police officer testified that this man told him that he did this act or these [p. 38] acts because he didn't want blacks in the neighborhood. That's reprehensible to me and to any logical-thinking person in this day and age. It's plain wrong. The reasons why it was uttered, the reasons why it was wrong, lie in the head of this man, which really has been examined at length by Dr. Cooke and not by anybody for the State.

Dr. Cooke not only interviewed this man at length, he gave him four scientific tests. He had for his own review

– which he did, in fact, read and study – all the records of the Vineland Police Department, the indictment, medical notes from the jail, and so forth and so on. He had all of that discovery information. He testified that this man has evidence of being hypomanic. He testified that this man has had a drinking problem since he was age 19 when he was subjected to the pressures, the anxiety, of pharmaceutical school. He handled it the wrong way. He did a lot of crazy things.

You heard testimony on September 5 from people who knew him. Among whom was his best friend, who submitted a report to you, who submitted testimony to all of us, of the goofy, wrong, silly, stupid, lacking-in-good-judgment things, that this defendant did. Not out of malice or hatred, but because he exercised poor judgment.

The doctor rendered the opinion that there is a pattern of alcohol abuse. He also stated that he clearly has a pattern of drug dependence. This started due to the pressures [p. 39] of pharmacy school. They were made worse by his gastrointestinal problems to combat the pain. He, unfortunately, became drug dependent. When mixed with alcohol, as the doctor testified uncontrovertedly, it becomes worse. His poor judgment becomes even worse.

The testing, the objective testing – not merely the interview or the clinical diagnosis, but the objective testing as testified to by the doctor and as appears on his (sic) – Page 6 of his report indicate (sic), quote, "Considerable pathology." Meaning, as Your Honor knows, there is something wrong up there. Obsessive-compulsive traits are evident on the testing, as they were on the interview.

He testified to that. Nobody said anything different. When he is disinhibited by drugs, alcohol, or emotional stimulation, then his condition becomes even worse.

His diagnoses where obsessive-compulsive disorder, psychlosymic (phonetic) disorder, drug dependence, alcohol abuse.

He testified it was his opinion that at the time of the incident last reported upon, that the defendant suffered from these disorders. As a result of these disorders, his judgment and his impulse control were substantially impaired at the time. He certainly knew that he was discharging the weapon toward the house and that it was wrong. Therefore, he does not meet the criteria for insanity. However, the testing clearly [p. 40] shows that his anxiety can disrupt his attention, his concentration, his perception, his judgment, and his impulse control. These characteristics make him far more suggestible and far more easily coerced than the average individual.

He testified also as he stated in his report on Page 8, that "I can offer the opinion that he is far more likely to admit to things that he did not do than would be the average individual. He has a strong need to remove himself from emotionally-stimulating situations. And if he believed that telling the police things that would satisfy them would get him out of the situation, he would be quite likely to do so."

Now, if we take the report of the expert, uncontroverted opinion, put it together with what happens when questioned – when the defendant was questioned by Detective/Sergeant D'Augostine, we can never like – no thinking person can ever like what this man said as

the reason why he did these things. But we can understand them, even though they are wrong. It gives us an inside view of the mindset of a man who would do things like this. And admit them!

Now, this defendant sat before Your Honor under oath and he showed very graphically the proof of the doctor's differential diagnosis as his (sic) condition. He told a real good story, in my humble opinion, before the Prosecutor said to him, "You lied to the Judge."

[p. 41] And he said, "Yes, I lied to the Judge."

"You lied to the Judge."

And he admitted it. Why? Because he's that way. He will say things that are untrue to get himself out of – as the doctor said, get himself out of the situation. He would tell people things that weren't true to remove himself from an emotionally-threatening situation.

When Detective/Sergeant D'Augostine, who is a fine officer and a very effective examiner, by the way – and you probably know that like I do – when he told this man, "You did it because" –

The average person is going to say, "No, I didn't do it. That's not true."

But he's not the average person. If we can understand what the doctor's diagnosis, the doctor's explanations for his reasons are, you, the sitting judge, can understand why he sat on that stand and answered the same questions that I put to him differently from how the Prosecutor put to him. Why? Because he has this impaired judgment which, on the incidents in question,

was made worse by the synergistic effect of the drugs and the alcohol.

Now, Judge, before you render a sentence, I would like to make some comments pertaining to the Pre-Sentence Investigation Report, which I –

THE COURT: Well, I'll let you do that when I [p. 42] announce the decision on whether an extended term –

MR. O'NEILL: Thank you, –

THE COURT: – should apply or not.

MR. O'NEILL: – sir. That's – I just –

THE COURT: All right.

MR. O'NEILL: – wanted to reserve my rights on that.

THE COURT: And if you're finished with that aspect of it, then I'll make my decision known. And then you can address the sentencing –

MR. O'NEILL: Very good, sir.

THE COURT: – issue.

MR. O'NEILL: I'd like, also, with the Court's permission, time to address aggravating and mitigating factors if I may.

THE COURT: Absolutely.

MR. O'NEILL: So let me wind this up, Judge. I've had a lot of cases, you've had a lot of cases. I don't know if you've ever had a case like this, but I never have.

We came forth directly and said, "There is no insanity defense in this case." He knew the difference between right and wrong, but he did not see things the way you and I and Bob Luther see things He didn't see things the way Michael Fowlkes or Mattie Fowlkes see things. Because, hopefully, the average person would consider all of us normal. He's been identified by a doctor as being abnormal, as needing help. He's got to go to jail. He [p. 43] understands that. But does he have to go to jail for admitting something as a reason for committing these crimes, when we all know full well that that's a lie, it's wrong, because he doesn't have good judgment?

The cop says to him – and the cop remembered, had to know – he had to know that Ms. Fowlkes earlier, before this defendant was apprehended, had attributed racial bias motivation to the commission of these crimes. He had to know that. He said to the defendant, "You did it 'cause they were black. You did it 'cause you didn't want them in your neighborhood."

And, foolishly, as he said to you and to Bob Luther on the witness stand, "Yes." Why? Because he wanted to remove himself from an emotionally-threatening situation. "I'll tell them anything they want to hear so I can get out of here so they'll go easy on me."

Now, you know, you and I know – and I'm sure Mr. Luther knows – there are times when people trained in the law, judges, lawyers, say things they shouldn't say when they're accused of things, even if they didn't commit those things. Why? Because they are emotionally threatened. These people, we can assume, I hope, are rational, thoughtful, reasonable, regular people.

This man is not. He's not any of those things. And if we look at the report given by Dr. Grill (phonetic), [p. 44] indicating the life expectancy of the various drugs taken by this defendant on the night before and the morning of this incident, we can understand. For example, he said that Ativan has a life – a half-life of 10 to 20 hours. He goes on to talk about Dilaudid. Then he talks about Lomotil and the other drug the defendant took.

Judge, we're not dealing with a normal person. We're dealing with a person who if he's threatened, he wants to remove himself from a threatened atmosphere, will say almost anything, even if it's not true, to get out of it. If he thought when Mr. Luther was cross-examining him and when you were asking him questions that if he gave you what he wanted – Mr. Luther wanted or what you wanted – he would be – got off that stand and removed from the situation quicker than he would do it because he can't handle stress. And that's why he said those things.

You heard and you saw the testimony, the affidavits under oath, of the African-Americans who testified they've known this man for three years, going back to when he was a baby. Been in the family home on many occasions with him. Never saw any incident involving racial bias by this man. They bowled with him. He invited one of the black men over to his house for Super Bowl parties. They went out drinking and eating after bowling. They socialized regularly. He worked with these people. Never did any one of them see any evidence [p. 45] of racial bias. Here are people who put their relationship with their community, with our community, on the line to tell you what's right, so that you can make the right decision here, which is to find that, A, the law is

invalid. There is no proof required by a preponderance. It has to be beyond a reasonable doubt.

Two, that this man cannot be believed. What he said under stress to the detective, that he did it because he didn't want blacks in the neighborhood, when the detective knew or had to know that the prior assigned (sic) reason for the shootings was racial, as indicated by Ms. Fowlkes.

So, therefore, Judge, in conclusion as to these issues, one, the law is invalid. And, Two, as the defendant lied on the stand as to whether he remembered – he didn't remember something. He also lied to Detective/Sergeant D'Augostine because he wanted to remove himself from those emotionally-threatening circumstances.

Thank you.

THE COURT: Very well. Gentlemen, as you're well aware, the statute which we're talking about, 2C:44-3, provides for an enhanced penalty when the Court is satisfied by a preponderance of the evidence that the actions of a defendant are motivated by racial bias. Now, the statute does not make speaking eligible for enhanced penalty. What it makes eligible for an enhanced penalty is some action on the part of the [p. 46] defendant that causes harm to someone else or some other persons or property.

And I think the Court can quickly dispose of the argument that the statute's unconstitutional. I'm satisfied that this case of *State versus Des Marets*, 92 New Jersey, Page 62, a 1983 case, which was authorized by Chief Justice Wilentz, is not applicable to that argument.

The Court in that case said that the actor's state of mind was meant to be irrelevant. It was then talking about the Graves Act. With regard to elements of a crime, there is no question about the fact that those elements have to be proved to the satisfaction to the trier of fact by proof beyond a reasonable doubt.

But the issue here is one which the Legislature has left to the discretion of the Court. And if the Court is satisfied by a preponderance of the evidence that there is racial motivation in the actions of a defendant, then the Enhanced Penalty Statute is applicable.

My notes indicate that both parties agreed that the *Miranda* warnings were given and that the statement given to the police was voluntarily and knowingly given.

The defendant contends that portions of the statement, wherein he admits that the shootings resulted from racial bias, were not true. He maintains that the suggestion of racial bias first came from the interviewing officer. And [p. 47] that, furthermore, he did not know until being questioned at the police station that the house at which he fired was the residence of African-Americans.

Now, to support that contention, the statement he gave to the police was not true, there was introduced to the Court testimony of a Dr. Gerald Cooke, a clinical and forensic psychologist. The doctor apparently interviewed the defendant while he was incarcerated in the County Jail. And his ultimate opinion was supported by the results of that interview, the doctor's review of police reports, and the administering to the defendant of a series of personality tests.

The doctor found that the defendant was heavily into drugs and alcohol. Found him to be, among other things, anxious, insecure, with feelings of poor self-image and inadequacy. The doctor, furthermore, found the defendant to be obsessive and compulsive. And I'm reading from his report, "And one who projects his problems onto others. That he becomes very angry when under the influence of alcohol."

And here the defendant says that he was under the influence of alcohol, having had a number of drinks prior – shortly prior to the incident.

Now, the doctor's opinion is supportive of the defendant's condition that he lied to the police merely to extricate himself from an uncomfortable situation. In other words, to stop the interrogation.

[p. 48] Dr. Cooke candidly admitted, however, that he could not tell if Mr. Apprendi was, in fact, now telling the truth about his motive for firing at the house. The most that the doctor said that he could opine was that the defendant's lying to get out of an unpleasant situation would be consistent with his test results. In other words, consistent with personality traits revealed by the tests.

The testimony of the defendant before this Court earlier this month is that the first suggestion that he might have acted out of bias came from the interrogating officer. And that to quickly end the interrogation, which he apparently found seriously unpleasant, he adopted the police officer's suggestion by admitting that he fired at the house because it was occupied by Afro-Americans. He buttressed his testimony that he – that the police made the suggestion by saying that the police described

to him the horrors of jail. And, thus, making him even more pliable. He denies ever having any bias toward blacks.

The officer, Dennis D'Augostine, denied that the police planted this bias motive. The police report itself reflects that the defendant admitted knowing black persons lived at the house because he had seen them outside. That's what he told the police on the night of the interrogation. An that he was giving them a message by firing at the house.

Now, the testimony of the officer is corroborative of [p. 49] the report. And, furthermore, the defendant, according to the report (sic) – according to the testimony of the officer, did not appear intoxicated. He answered the questions clearly, according to the testimony of Detective D'Augostine. And, furthermore, the detective's testimony – I think the report reflects that questioning ceased when the defendant requested counsel.

Now, the Court heard testimony and received letters from acquaintances, friends and relatives, all to the effect that the defendant was not a racist and that he never expressed racial remarks. And that he is not racially biased. Some of these letters and reports came from black persons. An affidavit – in the form of affidavits and letters.

And I might say in passing that I think everybody here recognizes the fact that persons who have racial bias don't wear that bias as some badge of honor. I mean, the remarks that people make of that nature – those remarks are protected by the First Amendment – usually are done behind closed doors. And people just don't take action on

those (sic) bias. So that these people who submit these letters don't know, obviously, what has gone on in the mind of the defendant.

Now, at the entry of his plea of guilty before this Court on July the 24th, the defendant under oath said that the purpose of his firing the gun was to scare someone.

And I refer you gentlemen to the transcript. I [p. 50] ordered a copy of it. I think I sent you copies of it. Page 13, Line (sic) 1 through 4, and Page 28, Lines 19 through 25.

Now, since then the defendant has written to the Court three or four letters since the entry of his plea. And all those letters were shared with both the prosecution and defense counsel. And those letters, at least in part, attempt to negate what the defendant purportedly told the police and what he told the Court under oath when he entered his plea.

And his newly-adopted position is that he never intended to scare anyone when he fired the shots. That he was not clear on (sic) July – in July when he – because he was "overwhelmed with lawyers and detectives" – and I quote from the letter – "and prosecutors, and he wasn't thinking clearly." His present position, or at least his position in the letters, is – as I understand it, is that he fired the shots only to break something.

And I might say that we didn't have before us – or I didn't know – that the door of the Fowlkes residence was not purple, as described by the defendant. It was almost totally clear glass, according to Mr. Fowlkes this morning,

with a 3-inch burgundy border. So I, quite frankly, have difficulty in believing that the defendant was attracted to this door by the color. And that something went off in his mind under this (sic) – in his intoxicated state of mind that he wanted to destroy the door.

[p. 51] Now, the Court finds the testimony of Detective D'Augostine to be credible, believable. And there's no reason to believe that the police initiated the idea of the reason for firing the gun.

Both sides, in stipulating there was no *Miranda* issue, impliedly conceded that the questioning by the police was not overbearing. It was not onerous or is not in any sense dictatorial. That it was relatively brief. And evidence that it was not burdensome can be taken from the fact that the questioning stopped when the defendant requested a lawyer. One need look no further than the defendant's own statement to the police and to the Court to be satisfied that the crime was motivated by racial bias. The defendant contends that he did not know that blacks resided in the home.

And the question has to be asked, as I think Mr. Luther asked it this morning: Why then did the defendant pick this particular target out not once, but at least twice as his target? No other Afro-Americans lived in the neighborhood. His excuse that he became incensed by the door and its color is bizarre and not accepted by the Court, particularly in light of Mr. Fowlkes testimony this morning.

The Court's satisfied that at the entry of his plea he once again admitted his motive. And is trying by his

letters to explain away his statement so as to avoid the punishment for a biased crime.

[p. 52] I went to the trouble, quite frankly, gentlemen, of ordering the tape of the plea. Those proceedings lasted approximately 30 minutes. And there was nothing in that proceeding that was so overbearing as to cause the defendant to misstate his plea, which he is attempting to do through the use of these letters.

The defendant has presented himself as articulate. He's intelligent and in full control of his faculties. He's educated. And the Court is satisfied that the defendant said and meant what he said when questioned by the police. And I'm satisfied that when the Court took the plea that he said what he meant and meant what he said.

Accordingly, the Court finds the standard of proof required by the statute has been met. The defendant is subject to enhanced penalties.

Now, that's not to say that the defendant's without psychiatric problems. I think any fair reading of Dr. Fowlkes (sic) – of Dr. Cooke's report would indicate that he's got serious problems that may have been [ex]acerbated by the use of alcohol and drugs. But the use of alcohol and drugs and the treatment of his psychiatric problem is a medical problem. The Court can't treat medical problems. All I can do is attempt to treat the social problems.

And let's not forget that the intoxication allegedly that the defendant was under is not alleged in this case by way [p. 53] of negating purposefulness or knowledge. That would have been a defense if this case had been

tried, but it wasn't urged as a defense. The defendant in this case has pled guilty.

The Court's satisfied that it was an appropriate plea. And in fashioning the sentence I'll take into consideration the psychiatric problems.

The State has an interest in protecting its citizens from crimes of this nature. And the Court has dictated an extended term. It's not discretionary, it's mandatory once that threshold question's been answered. And I intend to impose the enhanced penalty.

Now, I'll hear you on sentencing.

Let me tell you something.

MR. O'NEILL: May it please the Court,

THE COURT: Now, let me tell you. And I address this to your client. I mean, if – you read the Fowlkes letter. It's part of the plea sentence agreement. I mean, can you imagine the terror of somebody living in their house and having shots fired at? And, obviously, just because they were – and I think the – Ms. Fowlkes wrote the letter, because they – it had something they couldn't control, which is the color of their skin. I mean, it's frightening.

But go ahead, Mr. O'Neill.

MR. O'NEILL: May it please the Court, first I'd like to address the Pre-Sentence Investigation Report, which really [p. 54] requires some comments.

Number One, the statement as to the plea agreement is incorrect. Your Honor, of course, is going to go by the

plea agreement negotiated between Mr. Luther and me, and as agreed to by the defendant. But it is wrong. It's not correct to say that it's up to 20 years in State Prison with ten years of parole ineligibly [sic] as to Count 18. I could go on about that, but it's – I know the Court will take the actual plea and not that which is included within.

THE COURT: Well, I'm – are you telling me that the plea agreement, as I read it, where it says, "The State reserves the right to speak and ask for the maximum extended term sentence on Count 18 of 20 years New Jersey State Prison, ten without parole" – and then it goes on and talks about the other counts – that's not correct?

MR. O'NEILL: No, it says that the – the plea agreement was that the Court (sic) – that the Prosecutor argued for that. He can argue for that. But it's within the discretion of the Court. That's what I'm saying. It's not –

THE COURT: Right; okay.

MR. O'NEILL: – not correctly stated.

Now, then there's a – the question that really puzzles me, Judge, and that is this. That Mr. Luther's brief was included within the PSI. None of the defense's three briefs was included. I don't know why. But it troubles me.

[p. 55] THE COURT: I read all of your briefs. I didn't – I think his brief on the sentencing was submitted before I even looked at the PSI, I believe. But, in any event, I read them all. So I didn't give any particular weight to when his brief was submitted or if it was attached to the PSI. And it probably ought not to be attached to it. And I'll have them direct the Criminal

Court Management Office to take it off of the – out of the PSI; fair enough?

MR. O'NEILL: Yeah, Judge, 'cause I've never seen it before. I thought it was, you know, fairer to one side –

THE COURT: You never saw it before?

MR. O'NEILL: No. No, I never saw a Prosecutor's brief enclosed within a Pre-Sentence Report.

THE COURT: Okay; but you've seen the brief before today?

MR. O'NEILL: Well, sure I did. I –

THE COURT: Okay.

MR. O'NEILL: – responded to it.

THE COURT: Great.

MR. O'NEILL: But then as to the restitution issue, Judge, there's the estimate that was brought out and became the subject of D-1, the Naness Construction report indicating the amount of the damage. But it's not in accordance with the police report.

There's also the situation in reference to the [p. 56] applicability of insurance and the fact that other than a $500 deductible – apparently from what I can glean from the documentation, the balance of the damage is covered.

Now, finally, Judge, and perhaps most troubling to me, is that none of the 29 character reference letters submitted by us to the Court, to Criminal Case Management, to probation, was included within that report. And that's wrong, too, I submit.

THE COURT: They were sent up to me earlier this week with the report. I don't think they were attached. But they're –

MR. O'NEILL: They were not.

THE COURT: – a separate packet. And I've read them.

MR. O'NEILL: Now, with Your Honor's permission I'd like to address the aspect of mitigating circumstances. I respectfully submit, Judge, that the second mitigating circumstance is one that should be considered by you because the defendant really did not contemplate that his conduct would cause or threaten serious harm.

And I call (sic) the Court's – or invite the Court's attention to the demonstration by the Prosecutor with regard to the laser beam (sic) – the laser sight on the rifle. If the defendant, having this knowledge and involvement with weaponry really wanted to harm somebody – and if you're (sic) intended [p. 57] to use that type of a sight, he certainly could have done so, rather than just firing shots apparently haphazardly.

Now, insofar as the diagnosis by the doctor, including obsessive-compulsive disorder and psychlosymic disorder, drug dependence, and alcohol abuse, impulse-disorder kleptomania, and so forth, these orders (sic) – these disorders, coupled with the drug and alcohol intoxication, as Dr. Cooke testified to on September 5 and as appears in his report of May 14 on Page 8, resulted in a substantially impaired judgment and impulse control.

These prevented him from contemplating that his conduct would cause serious harm to the residents of the house.

Now, he testified, the defendant did. He told the doctor that he was attracted not by the appearance of black people in the premises, but really by this door. But, Judge, in – I think the important, the salient part, of this Mitigating Factor Number 2 would be that putting everything together, the totality of the circumstances, if you will, that it's uncontroverted that this man suffers from substantially impaired judgment and impulse control. And these are the reasons why he does the things that we think are so wrong – are so wrong. That's why he does them. And I think the Court should take that under consideration in passing sentence.

The next mitigating circumstance is Number 4. The doctor made it clear that there is not insanity here. But [p. 58] because of this preexisting problem that this defendant has, he suffers from self-defeating psychological disorders.

Now, you witnessed these firsthand when you saw him testify on the 5th of September. When he testified he had to know that one of the purposes in addressing the Court was to establish credibility in view of what he said to Detective/Sergeant D'Augostine. It seems to me, Judge, that the testimony of the defendant before you substantiated what happened in the presence of Sergeant D'Augostine. The man acted in accordance with the diagnosed problem of substantially impaired judgment and impulse control problems. He didn't respond the same way to your and the Prosecutor's questions as he did to

my virtually the same questions. And that's significant. It shows that the doctor is right.

Mitigating Circumstance Number 7, Judge, the defendant has no prior history of delinquency or criminal activity. He's never been convicted of a crime.

Number 10, the Pre-Sentence Investigation reports on Page 8 that the defendant would respond favorably to rehabilitation. I submit that that's very important.

Number 11, this is a problem in the sense that not only does he have these gastrointestinal problems – and the longer he's away the more likely it is that they're going to get worse. Your Honor has already decided to sentence him under the racially-enhanced statute. Therefore, if his fellow [p. 59] inmates at the prison become aware of this, he might be subjected to some danger.

Number 12, it's indicated by the Pre-Sentence reporter that the defendant was cooperative with law enforcement authorities.

Judge, this is a situation, as I indicated earlier, in which there is no question that jail is necessary. Society has to understand that people who commit crimes must be punished for them. In this particular instance jail is appropriate. But I suggest to the Court that you might well consider the length of the sentence in terms of the totality of the circumstances that have been brought before you.

Most significantly, that testified to by the doctor, uncontroverted as to the reasons why this man has done these bad things. Lack of good judgment, lack of impulse control, the synergistic effect of the drugs, the alcohol, the

lasting effect of the drugs, as indicated by Dr. Grill in his letter.

Judge, putting these things all together, I would suggest that the term imposed by the Court should not be the maximum term. It should be a term in keeping with the circumstances here. A term in keeping with his mental condition and his propensity for rehabilitation, as indicated in the Pre-Sentence Report.

Thank you.

THE COURT: What's your position with regard to the [p. 60] applicability of the Graves Act? No question in your mind that that applies; is there?

MR. O'NEILL: No, Judge, there's no question. It's mandatory. We know – and I've explained to the defendant what happens when there is a crime involving the use of a gun improperly. He understands that mandatory aspect of that, Judge.

THE COURT: Fine.

Mr. Luther.

MR. LUTHER: Thank you, Judge. Judge, I'll be brief, I've already submitted a brief to the Court addressing the aggravating and mitigating factors. I'll rely on that.

Just briefly, Mr. O'Neill indicates Mitigating Factor Number 2 is present here, that the defendant did not contemplate that his conduct would cause or threaten serious harm. Judge, I think clearly that that's not applicable.

September 24, the bullet that was fired entered a bedroom window where 8-year-old Michael Fowlkes was sleeping. It was later recovered in the hallway of the home. And December 22, there were numerous bullets, a veritable barrage of bullets, that were fired at the house, most of which, again, entered into the premises of the home. One of the bullets actually lodged into Dawn Fowlkes bedroom wall. So to say that he didn't contemplate that his conduct would cause or threaten serious harm is just not accurate.

[p. 61] And that doesn't even get into this psychological damage that the Fowlkes have suffered as a result of these attacks.

Mr. O'Neill also indicates that the defendant would respond affirmatively to probationary treatment. Judge, I don't think that that factor should be found here. First of all is the repetitive nature of this crime. This was not an isolated incident. This happened on more than one occasion. And, also, Dr. Cooke, the defense's own psychologist, indicate that the defendant is unpredictable and should be watched carefully.

So that's all that the State has to add at this point about aggravating and mitigating circumstances.

Judge, Mattie Fowlkes submitted a letter to the Court. I'm sure the Court has read it.

THE COURT: I've read it.

MR. LUTHER: But at this time Michael Fowlkes would like to address the Court.

THE COURT: Very well. Mr. Fowlkes, you can do it from right there; that's fine. The microphone will pick your voice up.

MR. FOWLKES: Robert, can I talk to you for a second,

MR. LUTHER: Sure.

(Whereupon the Prosecutor and Mr. Fowlkes conferring)

MR. FOWLKES: Your Honor, I thank you for this [p. 62] allotted time that you have given us. As you know, Your Honor, I have lived in Cumberland County for 12 to 14 years. And I know that your docket is pretty full. So I appreciate the time that you give me and my family, Your Honor.

You know – you know, Your Honor, me and my-wife, we – we worked on this home over four years to get into this position to – to buy this home. And unfortunately in life there's choices that we have to make. And that's what I would like my theme to be about, choices; okay?

It's mindboggling, Your Honor, that – that – that we, as – are involved in a situation like this because of choices that an individual has made towards us. Unprovoked, I might add.

And, you know, I – I just – you know, it's like my mother told me, you know, when this happened. You know, I – I pity Charles more than I scorn him. You understand what I'm saying, Your Honor? I don't have no hatred or anything towards Charles. I just – it – it – it's mindboggling that an individual like that will – will go to school for his career goals and achieve those goals in becoming a pharmacist. And to waste his time, effort, to

get up in the middle of the night and jump in that gray pickup truck and to wait (sic) – and drive down that road and wait for the traffic to go by, turn out the lights, and pull that type of firearm out of there to shoot in anyone's home is unacceptable, Your Honor, in our [p. 63] county.

You know, we – our county has had racial incidents for years, Your Honor. We had the Williams shooting with the police officer. We had all the literature that was in our public library in Vineland. Not counting the numerous cross burnings, Your Honor.

Well, what I'm asking this Court today, Your Honor – I'm asking you to – to – to make an example to let people know that if you come to Cumberland County – you can have all your – your – your hatred thoughts in your mind.

You can think anything that you want to think, Charles. But if you choose to act those – those thoughts out then there is a price to pay. And that price is your freedom. You chose to do this. We didn't. We didn't know you. Didn't want to know you. But now, unfortunately, Charles, we are entwined for life. You see what I'm saying? We're – we've – we will be together for life, because our memories, you know – you can't –

You know, to watch those kids face (sic) – my three kids come down in that foyer and to see them bullet holes, glass, sprayed all over everywhere that is an unforgettable sight, Charles. And, Charles, being that you did this, I wouldn't even wish that on you. Not even on you to put our –

You know, Your Honor, our – our – when we first moved in this house people would ride by that house and they [p. 64] would pull up in the driveway. They would say, "Oh, what a beautiful home. Mike and Mattie, how did y'all go about doing this?" 'Cause we all have something in common with that, Your Honor. We all want a piece of the American dream, you know? And that first month in that house was a – was a beautiful time, as far as mentally.

But now when people ride by, "That's the house that the pharmacist shot at. That's the house that – that – that they had all the problems that the pharmacist shot at because they were black folks;" you know?

And, Your Honor, I don't – I don't want to waste no more of your time. And I thank you very much for your – for your – for your time. But as a family but more importantly as a community, Your Honor, I had over 3-400 people come to that house. I had so many people come to the house I was tired of them coming. They was tracking up my floors and everything. I was tired of them. I mean, I appreciate it, but I was tired. You know, we ask you that you give Charles Apprendi the maximum sentence allowed by law for his heinous, terribly stupid acts that he chose to do. We ask you that you give him the maximum sentence, Your Honor.

THE COURT: All right, Mr. Fowlkes; thank you.

Anything else, Prosecutor?

MR. LUTHER: No, Your Honor.

THE COURT: All right. Mr. Apprendi, you want to [p. 65] stand up, please?

Is there anything you'd like to say on your own behalf before the Court imposes sentence?

MR. APPRENDI: Yes, just a couple things, Your Honor. First of all, I'd like to apologize to Mr. Fowlkes and his family for what I've – for what I really did. It's very – I realize that it is very wrong. And I am very sorry. I am honestly very sorry that I did this. I know I deserve to be punished for – for what I did.

But as far as the racial issue, there are so many lies and distortions and twisting of facts in this case that it would take me at least three hours to explain it to the Court. And I – I've tried to do that before. It's just not – it's just not true. My statement was not voluntary. It was – I was – I was just pounded by that detective. And then he goes on the stand and lies about it. I can't do anything about that.

As far as this black Santa on the door, I never – this – right now is the first time in the past nine months that I've ever heard of this fact about this black Santa. I didn't see any black Santa on the door.

And the door – whether I call it purple or burgundy has – it's ridiculous. It shouldn't even have been mentioned It attracted my eye. There was – the door – there was more than – not more than a 6-inch – there was more than a 6-inch [p. 66] border of purple or burgundy. The bottom of the – of the door was solid from what I can remember.

I never meant to hurt or scare anybody. I thank God that nobody was hurt. I have never tried to hurt anybody in my whole life. And my 40 years of life is my proof that

racism is not a part of my life. I've interacted with – with black people, Puerto Rican people. You know, anything, everybody. I have never had a problem.

The whole thing is – is just absurd. I – I was mislead by – by extreme pressure from the – from the detective.

And as far as admitting to scaring – to – to wanting to scare somebody when I took that plea agreement, I wouldn't answer that question that Mr. Luther presented to me because it was – it was not true. And I was under the impression that it was – how it was reworded by Mr. O'Neill, that I was not admitting to scaring anybody.

Well, you know, of course, people are going to think of the testimony. And they're going to say, "What was I thinking of? Why did I do it?" I've been asking myself this question for the past nine months, Your Honor. I wasn't thinking, period. It's not what I was thinking. I wasn't thinking. I wasn't rational. I was under the influence of alcohol and drugs.

And as far as the drugs being out of my system, which [p. 67] Mr. Luther suggested, it's just not true. one of the drugs, Ativan, has a half-life of 20 hours. I took that about 1:30 ii the morning or something like that.

I didn't – another thing is I didn't get up in the middle of the night and decide to go shoot at a house. I was at – I was at the bar. I was at the bar until like 1:30. And then the detective says I was there 'till 12 o'clock. That's not truth (sic) – it's not the truth. I didn't go home and go to sleep. I was intoxicated.

There's no other reason ever for anybody to ever, you know – I mean, like – like I'm agreeing with Mr. Fowlkes.

In this day of (sic) age somebody should be – somebody should be damned and condemned if – if the truth is that it was done for racial purposes. But this is not the truth, Your Honor.

Another thing about asking for counsel to stop the testimony. I never asked for counsel. I never had a lawyer. I didn't have – I didn't want to call my lawyer. At the time when I admitted these things, I had gone about 23 hours with no sleep. And the – the additive effects of the central nervous system depressant with alcohol – I was so – I was so exhausted. That's why I stopped the testimony. I didn't know what I was doing. I was – I was in a fog.

But the most important thing is that – that race was – had nothing to do with this case, Your Honor. None at all. And I am very – I am very sorry for what I did.

[p. 68] That's the – the most important things that I have to say.

I hope the Fowlkes maybe someday can understand. I realize that they're not going to forget me right now, but I just hope that someday maybe they can.

THE COURT: All right. Let me say this to you, Mr. Apprendi, and to Mr. Fowlkes.

The Court does not – the maximum sentence in this case is 20 years. And that's because it's an enhanced penalty that normally would have been ten years. And you're being exposed to that range of punishment as the punishment that you receive for a racially-biased crime.

And I might say that I don't have to look – I could forget about the police report. And from all the other evidence before me, the Court made a – could have made

a decision that's supported by all the other evidence that what you did was racially motivated.

If your position is that your mind was so clouded by alcohol and drugs that you didn't know what you were doing, then you should have tried your case and used that as a defense that you didn't have the requisite knowledge or purposefulness that would have satisfied the statute.

Particularly one in your situation where you have a – where you have training and education and the use of drugs. I find that to be unacceptable. The Court's not going to [p. 69] excuse one wrong, the firing at the house, by using another wrong, which is the overuse of drugs and alcohol if that, in fact, did take place.

On Indictment 00046, the 18th count –

Before I do that I might well take into consideration the aggravating and mitigating factors that have been urged by the Prosecutor and defense counsel.

With regard to the mitigating factors, let me say, first of all, that Number 4, that there were substantial grounds tending to excuse or justify the conduct of the defendant, is rejected as a applicable mitigating factor.

Likewise, Number 2, that the defendant did not contemplate that his conduct would cause or threaten serious harm, is likewise rejected. Whether he intended to hurt somebody, whether he intended to scare someone, or whether he intended to do property damage, it's inescapable that his conduct was designed to cause some type of harm. It probably caused almost the worse type of harm, which is psychological harm, to the Fowlkes.

The Court finds that Number 6, that he will compensate the victims for their financial loss, is a consideration. I'll accept the note that I received from the probation officer dated September 22nd, that she – and I read "The victim phoned and reported an uncompensated loss of $1,900 property damage and $80 in medical bills for counseling because [p. 70] of the incident."

And the Court will order restitution in that amount. If there's any argument with it by the Prosecutor or defense counsel, make an application within the next 30 days and I'll give you a restitution hearing.

The Court determines that Number 7 – particularly applicable in this case. The defendant has no history of prior delinquency or criminal activity and has led, prior to this, a law-abiding life.

Likewise, Number 8, the Court finds to be applicable that his conduct was the result of circumstances unlikely to recur, particularly in view of the fact that he's acknowledged his culpability. And he's obviously headed for incarceration.

The Court finds Number 2 and Number 9 of the aggravating factors applicable in this case.

And the Court also takes into consideration that, as I said before, I'm satisfied the defendant has a psychiatric problem. And I'm satisfied, quite frankly, that this racial bias would not have manifested itself, except for the psychiatric problem that he has.

Presumptive sentence at the enhanced level is 15 years. The obligation of the Court is to weigh the things that I've mentioned.

And, accordingly, on the 18th count, the sentence of the Court is that you be committed to the custody of the [p. 71] Commissioner of Corrections for a period of 12 years. Under the Graves Act there's a mandatory penalty. And the Court imposes a four-year period of parole ineligibility.

The sentence on the third count is that you be committed to the custody of the Commissioner of Corrections for a period of seven years, with a period of parole ineligibility of three years.

Now, the Court's aware that all of these were independent acts. But, nevertheless, I'm satisfied that they represent an aberration. And, accordingly, the counts will all run concurrent to each other.

On the 22nd count the sentence of the Court is that you be sentenced to three years in the New Jersey State Prison And, as I said, this sentence is to run concurrent to the sentence on the other three (sic) counts – on the other two counts.

There's a hundred-dollar Violent Crime Commission penalty and a $75 Safe Street Act penalty on each of the counts.

The collection of the fines and penalties, as well as the restitution, is transferred to the prison authorities.

And if there's difficulty, Mr. O'Neill, with the type of crime and his safety in the prison, that's something that he'll have to wrestle with. And that's up to the – that's a problem of the corrections facility. I can't help that.

[p. 72] The balance of the counts, as I understand it, Prosecutor, are to be dismissed?

MR. LUTHER: Yes, Your Honor.

THE COURT: All right. The defendant –

So ordered.

– the defendant has 45 days within which to appeal this sentence. If he wishes to do and cannot afford an attorney, one will be appointed to represent him. Anything else to come before the Court on this. matter?

MR. LUTHER: No, Your Honor.

THE COURT: Mr. O'Neill?

MR. O'NEILL: Judge, one other thing. D-1 should be admitted into evidence. Introduce that. That's the –

THE COURT: Fine. We'll make it part of the record; all right?

(Whereupon the hearing concluded at this time)

CERTIFICATION

I, CAROL H. VENDZULES, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the Superior Court on September 29, 1995, Tape No. 17189(1), Index No. from 1672 to 7349, Tape No. 17189(2), Index No. from 0000 to 1581, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-

compressed transcript of the proceedings according to the best of my ability and knowledge.

Signature /s/ Carol H. Vendzules
CAROL H. VENDZULES
CERTIFIED DIRECTOR/
TRANSCRIBER OF THE
STATE OF NEW JERSEY,
AOC #268
THE TYPE-RIGHT-ER

DATED: 1-9-96

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CUMBERLAND COUNTY
IND NO. 95-01-46
A.D. #A-1587-95-T4

STATE OF NEW JERSEY, Plaintiff, vs. CHARLES APPRENDI, JUNIOR, Defendant.	)	TRANSCRIPT OF PLENARY HEARING

Place: Cumberland County
Courthouse
Broad and Fayette Streets
Bridgeton, New Jersey

Date: September 5, 1995

BEFORE:

THE HONORABLE RUSHTON H. RIDGWAY, J.S.C.

TRANSCRIPT ORDERED BY:

JOSEPH D. O'NEILL, ESQ.

APPEARANCES:

ROBERT J. LUTHER, First Assistant Prosecutor
Attorney on behalf of the State of New Jersey

JOSEPH D. O'NEILL, Esq.
Attorney on behalf of the Defendant

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[p. 3] THE COURT: Just so we get this in the proper context, the State has moved for an extended term because it's a racially – they claim it's a racially-biased crime.

Am I correct in that?

MR. LUTHER: That is correct, Your Honor.

THE COURT: That motion's returnable on the date of sentencing, which is September the 15th.

You argue, Number One, that the statute is unconstitutional. And you both filed briefs on that issue. And, as I understand from our conversation in chambers, if I should find that the statute is unconstitutional, of course, that obviates the extended-term issue.

MR. O'NEILL: Exactly, Your Honor.

THE COURT: All right. But since witnesses are here on the extended-term issue, which are normally heard on the date of sentencing – but since they're here today and you're not going to add, as I understand it, any oral argument to the constitutionality issue, you're going to rely on the papers that you filed, I'll reserve decision on that.

MR. O'NEILL: I intend to, Judge, yes, sir.

THE COURT: And that's all true –

MR. O'NEILL: Yes, sir.

THE COURT: – so far?

All right. Now, the Prosecutor is going to come and we're going to treat this is [sic] a motion for a return on it today, [p. 4] rather than the date of sentencing.

True, Mr. Luther?

MR. LUTHER: Yes, Your Honor,

THE COURT: (Indiscernible – voice too low).

MR. LUTHER: – with respect to Dennis D'Augostine. I have the victims of the crime. I want to have them testify, as well. They're not here today. They intend to be here on the 15th. I'd like to have them testify briefly on the 15th at the date of sentencing.

THE COURT: What would they add to that issue?

MR. LUTHER: That they were the only – to their knowledge the only black family in that neighborhood at the time of the crimes.

THE COURT: You can't stipulate to that. We indicated that in chambers.

MR. O'NEILL: Only because it's not true. Now, it may be true as far as Ms. Fowlkes –

THE COURT: Well, I wouldn't –

MR. O'NEILL: – is concerned.

THE COURT: – want you to stipulate to something which is not true.

MR. O'NEILL: I'm sure you wouldn't, Judge. You know I wouldn't anyway; don't you?

THE COURT: I don't think you would.

But, in any event, –

[p. 5] MR. O'NEILL: Judge, –

THE COURT: – in any event, we'll get testimony on that. But there are other stipulations that can be entered into.

And then the Prosecutor will rest, subject to the testimony of –

What's the name, Fowlkes?

MR. LUTHER: Yes, Mattie and her husband, the Fowlkes.

THE COURT: Subject to that.

And then you can proceed with the witnesses that you have today.

MR. O'NEILL: Yes, Judge. If I may, two things.

Number One, the record should reflect that the defendant is present, but he is not wearing the suit that was carried to the jail for him to wear today. There's no jury here, so I know Your Honor will not –

THE COURT: Don't worry about it.

MR. O'NEILL: Thank you, Judge.

Number Two, Judge, the investigation developed Saturday that there was another black family who lived in that neighborhood on that street named Lake, who may have moved before the Fowlkes moved in. But there is a Vineland State School house on that street. There are three –

THE COURT: Well, where do the Fowlkes live? Or [p. 6] where did they live when this took place?

MR. O'NEILL: East Chestnut Avenue, Judge, in Vineland.

THE COURT: And –

MR. O'NEILL: 5211 East Chestnut. It's approximately –

THE COURT: Is that east of Lincoln Avenue?

MR. APPRENDI: West of Lincoln Avenue.

MR. LUTHER: Judge, it's approximately a hundred yards from the Atlantic County border. It is right at the edge.

THE COURT: Then that must east of Lincoln Avenue.

MR. APPRENDI: It's east. It's east.

THE COURT: It's east of Lincoln Avenue.

MR. O'NEILL: I think the Court's right, yeah.

There is a home – there are three homes together. One is the Fowlkes home. There is another home owned by an Italian family, Pinotti or something to that effect. And then there is a third home owned by the Vineland State School, at which location certain mentally retarded people live. And there are workers employed by the State there, some of whom are black and frequent the area. There either are black residents there or certainly black employees.

One of the employees is Ms. Fowlkes; okay? So with that in mind we can probably effectuate a stipulation, like Mr. [p. 7] Luther suggested, that perhaps the only residential people there were the Fowlkes family, who were African-Americans. But there were these other black people that I can prove were there. Ms. Fowlkes being one of them.

THE COURT: Well, I don't know if Mr. Luther is prepared to stipulate anything on that issue today; are you?

MR. LUTHER: If Mr. O'Neill would stipulate that the Fowlkes family was the only African-American residential family in the neighborhood of Mr. Apprendi who resided at 4745 East Chestnut, which was about, I think, seven-tenths of a mile down the road – if he's

prepared to stipulate that they were the only black residential family in the neighborhood of Mr. Apprendi, the State would accept that stipulation.

MR. O'NEILL: Well, what about my stipulation to the effect that the Lake family, a black family, lived there for many years? They may or may not have been living there at the time that Ms. Fowlkes moved in, which I think was July of 1994. Also, if the State would stipulate the provable fact that the Vineland State School does have a house there at which black people are –

MR. LUTHER: Judge, certainly I'd stipulate about the Vineland State School. And Mr. O'Neill just indicated on the record that he found out on Saturday about the Lake family, which I'm completely unaware of. So the sentencing –

THE COURT: I don't think that Mr. –

[p. 8] MR. LUTHER: But sentencing is the 15th.

THE COURT: – Luther's in a position to enter into the stipulation that you're suggesting today. So why can't we put that issue aside until the Fowlkes are here and you know that that issue's going to come up?

MR. O'NEILL: Sure.

THE COURT: You know what they're going to testify to. And you'll be prepared to meet it with whatever evidence that you have on the date of sentencing. I'm not going to accept your – quite frankly, and I say this respectfully, I'm not going to accept a stipulation from you that others were living in the area or that – the name of some other institution had people living in the area who were African-Americans. I mean, you have to bring

in some proof that its cogent before the Court; fair enough?

MR. O'NEILL: Sure.

THE COURT: All right; fine.

Now, but what we can stipulate to, as I understand it, is that the State through the police department took a statement from the defendant that the statement was – that he was properly *Mirandized* and that he voluntarily and knowingly gave this statement. And then in the statement he made certain representations as to the reason why he shot at the house.

Now, is that all – can we stipulate to that, Prosecuto [sic]

MR. LUTHER: That the *Miranda* was complied with, yes, [p. 9] Your Honor.

THE COURT: I mean, not only complied with, but that he gave a statement.

MR. LUTHER: Yes.

THE COURT: That the statement contained a portion thereof indicating that he had shot at the house because he knew that blacks were living there. Isn't that what the statement says?

MR. LUTHER: Yes, Judge.

THE COURT: All right. Then can we stipulate to all that?

MR. O'NEILL: Yes.

THE COURT: Okay; fine.

MR. O'NEILL: But with the admonition, if I may, that the position of the defense is that because of

Mr. Apprendi's physiological mindset because he had imbibed in drugs and alcohol because of the synergistic effect of these, that what he told the police was not true because he was misled into agreeing with what the police suggested to him. Namely, that the shooting was a racial bias (sic) act – a racially-biased act.

THE COURT: But he doesn't have to present the police officer or officers who took the statement to support his position. And you don't need that to cross-examine him, as I understand it.

[p. 10] MR. O'NEILL: No –

THE COURT: You're –

MR. O'NEILL: – not at all.

THE COURT: – going to present extra testimony to make sure, in a sense, that it's not connected with the police investigation. And it's namely a psychologist and some lay witnesses who are going to testify in this issue. Am I understanding it correctly?

MR. O'NEILL: Exactly, Judge.

THE COURT: Okay.

MR. LUTHER: Judge, with respect to the statement to Detective D'Augostine, Detective D'Augostine is in the courtroom today. It's my understanding there's a stipulation that *Miranda* was complied with. I would like to call him just to briefly inform the Court about the contents of the statement.

THE COURT: Isn't the statement memorialized? Did he sign off on it?

MR. LUTHER: No, it was not a taped statement. It was an oral statement to Detective D'Augostine.

MR. O'NEILL: Well, the Court has stated the stipulation that I would agree to. I see no reason to call the detective. If you want to sit here and listen to him, we all know what he's going to say. I'm not going to attack him.

THE COURT: Where is the detective?

[p. 11] MR. O'NEILL: He's in the back of the courtroom, Judge.

In other words, if there is anything missing from the stipulation proposed by the Court, Mr. Prosecutor, why don't you tell us and see if we can cure that –

THE COURT: No, he –

MR. O'NEILL: – to avoid the testimony?

MR. LUTHER: Judge, –

THE COURT: I assume that what Mr. Apprendi told Detective D'Augostine is in the police reports; true?

MR. LUTHER: Yes, Your Honor.

THE COURT: But it wasn't memorialized in any written statement or a taped statement.

MR. LUTHER: Correct.

THE COURT: Okay.

MR. O'NEILL: Judge, let him testify. I'll –

THE COURT: Raise your right hand. Stay right there. DET/SGT. DENNIS D'AUGOSTINE, WITNESS, SWORN DIRECT EXAMINATION BY THE COURT:

Q. Okay. And you know we're talking about an occasion when you talked to Mr. Apprendi?

A. Yes, sir.

Q. And you questioned him as to the reasons why – or reason why he fired a shot or shots at the Fowlkes home?

A. Yes, sir.

D. D'Augostine – Direct

[p. 12] Q. All right. What did he say?

A. He told me that he fired shots at the home because there were black – black people living there. And that he had seen them. And then I asked him how he knew the black family lived at this certain residence. And he told me he seen – seen one of them outside. And he stated that he shot at – on two different incidents.

During the interview I asked him if he was under the influence of drugs or alcohol.

Q. No. No. No. No, I don't want to go into that –

A. Okay.

Q. – at this point.

But it's stipulated the *Miranda* warnings were properly given and –

A. Yes, sir.

Q. – (indiscernible – voice too low)

A. I advised him of his –

Q. I just want to know what he said. And as to the report, I'll ask him –

A. Yeah.

Q. – (indiscernible – voice too low) taped statement (indiscernible – voice too low) statement.

Is there anything else you want to ask, Mr. Luther?

MR. LUTHER: Yeah, just the details about the incident itself, including the questions about drugs and [p. 13] alcohol, since certainly the defense psychiatrist (sic) – or psychologist is going to get into that. It is important that I call the detective just to ask him about that. It shouldn't be long.

THE COURT: You should save him for rebuttal witness.

MR. LUTHER: Well, he's –

THE COURT: Because I don't think that the psychiatrist's (sic) – or psychologist's testimony is going to be related to his (indiscernible – voice too low) or not. (Indiscernible – voice too low).

MR. LUTHER: Judge, if the Court wants – if the Court is treating today as the return date as the – for the motion of extended term on a racial bias, I just want to have the detective tell the Court what Mr. Apprendi told him on December 22, 1994.

THE COURT: He told me. He just told me what he said; that he fired at the house on two occasions because there were black people in it.

Is that right, Mr. D'Augostine?

THE WITNESS: Yes, sir.

THE COURT: Anything else you want to ask him on that issue, Mr. Luther?

MR. LUTHER: Sure.

DIRECT EXAMINATION BY MR. LUTHER:

Q. Did Mr. Apprendi state whether or not he knew the [p. 14] victims at the house that he fired at?

A. No, he did not know the victims.

Q. Did he say why he fired the shots at them then?

A. He stated he knew there were black –

MR. O'NEILL: Asked and answered. The Judge asked him that.

THE COURT: That's all right.

Go ahead.

THE WITNESS: He stated that he knew that there were black people who lived at that residence because he's seen them out in the yard. And he was giving them a message that they were in his neighborhood.

THE COURT: Now, you're reading from your police report?

THE WITNESS: Yes, sir.

THE COURT: Was that taken from notes made by you at the time?

THE WITNESS: Yes.

THE COURT: And do you need that to refresh your recollection today?

THE WITNESS: Yes, I do, Your Honor.

THE COURT: What else, Mr. Luther?

DIRECT EXAMINATION BY MR. LUTHER:

Q. Did he ever indicate that because the Fowlkes were black in color, Mr. Apprendi did not want them in the [p. 15] neighborhood?

A. That's correct.

MR. O'NEILL: Asked and answered, Judge, the third time.

THE COURT: All right.

DIRECT EXAMINATION BY MR. LUTHER:

Q. Yes?

A. Yes, sir.

MR. LUTHER: Judge, that's all I have on the limited issue of racial bias. Certainly, there were other things Mr. Apprendi said, but if the Courts want me to call the detective in rebuttal, I will.

THE COURT: If you need him.

MR. LUTHER: I will.

THE COURT: Let's see what the psychologist's –

MR. LUTHER: Okay.

THE COURT: – testimony is.

Any questions you want to ask the officer?

MR. O'NEILL: Yes, Judge, if I may.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. Sergeant, police reports of November 14 of 1994 indicate that Mattie Fowlkes stated her opinion that previous shootings at her house were racially motivated; isn't that true?

MR. LUTHER: Objection; way beyond the scope of

D. D'Augostine – Cross

[p. 16] direct.

THE COURT: Sustained.

MR. O'NEILL: May I be heard on that issue, Judge?

THE COURT: I sustained the objection. Let's move on.

MR. O'NEILL: Very well.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. There was another incident in the same neighborhood on October 24 of 1994 involving the Bergamo family; isn't that right?

MR. LUTHER: Objection; way beyond the scope of direct. And I've never even heard of this allegation until right now.

MR. O'NEILL: It's in the reports.

THE COURT: Sustained.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. Wasn't there an arson at the Bergamo premises on October 24 of '94?

MR. LUTHER: Judge, the Court just sustained my objection –

MR. O'NEILL: It's in –

MR. LUTHER: – on that very question.

MR. O'NEILL: – the police reports, Judge.

THE COURT: There are a lot of things that are in –

Listen, Mr. O'Neill. You suggested that we could [p. 17] shorten this up by putting certain stipulations on the record. And I agreed to do that. Do you want a full-blown hearing and have the detective take the witness stand and we'll go through the whole statement including perhaps, parts of the police report, and then you can cross-examine him at length. But the officer was placed under oath merely to verbalize what's in the police reports. Namely, what the defendant told to the police were the reasons – the reasons why he fired at the house. Now, if you want to go beyond that, I'll permit you to do it. But we're going to have a full-blown hearing.

MR. O'NEILL: Well, Judge, I don't need to do that. I was the one who agreed to the stipulation. My worthy adversary said he wanted to ask him some questions. I wasn't going to ask him anything.

THE COURT: The stipulation is that Mr. Apprendi told the police officers – words to the effect he fired at the house because the occupants were black. And he knew that they were black. And I think that substantially says what Mr. Apprendi told the police department.

Now, if you want to go beyond that –

MR. O'NEILL: No, that's what I agreed to stipulate, Judge.

THE COURT: All right; fine. So there we are. Now, what else do you want to ask this officer along these same lines?

[p. 18] MR. O'NEILL: No questions at this time, Judge.

THE COURT: Anything else, Mr. Luther?

MR. LUTHER: No, Your Honor.

THE COURT: Have a seat, Detective.

Now, as I understand it from our conversation in chambers, there were certain other stipulations which were put on the record which, in effect, the Prosecutor's going to argue, since he maintains the position that it was a racially-biased crime.

Am I right, Mr. Luther?

THE COURT: (No verbal response).

MR. LUTHER: Yes, Your Honor.

THE COURT: What are the other stipulations?

MR. O'NEILL: Judge, may I interject here for a second?

THE COURT: Sure.

MR. O'NEILL: I respectfully move that Detective/Sergeant D'Augostine leave the courtroom under *State versus Duff*. And I'm going to ask that the witnesses be sequestered.

MR. LUTHER: I have no objection, Your Honor.

THE COURT: All right. We're going to have to tell the witnesses. We have the witnesses here. Do you want all the witnesses?

MR. O'NEILL: I don't know if Mr. Luther's going to [p. 19] call any others, Judge. I just didn't want the sergeant here to hear our argument before the Court

on the law. It might effect his later testimony if he is recalled.

THE COURT: What are the other stipulations?

MR. LUTHER: Judge, the stipulations, I believe – I think that was all the stipulations that we agreed to, frankly, in chambers.

Am I correct?

MR. O'NEILL: (No verbal response).

THE COURT: Mr. O'Neill?

MR. O'NEILL: The defense calls Miller Taylor to the stand.

THE COURT: Mr. Taylor, place your left hand on the Bible and raise your right hand.

MILLER TAYLOR, WITNESS, SWORN

THE COURT: And your name is?

THE WITNESS: Miller Taylor.

THE COURT: Millard (sic) Taylor?

THE WITNESS: No, Miller.

THE COURT: Miller Taylor.

THE WITNESS: Right.

DIRECT EXAMINATION BY MR. O'NEILL:

Q. Mr. Taylor, would you tell His Honor by whom you are employed?

A. I'm employed by the State of New Jersey for Ancora State

[p. 20] Hospital.

Q. Do you know the defendant, Charles Apprendi, Junior?

A. Yes, I do.

Q. How do you know him, sir?

A. Bowling. Plus, he was my pharmacist.

THE COURT: I didn't catch the first part.

THE WITNESS: Bowling.

THE COURT: Bowling.

THE WITNESS: Yes.

DIRECT EXAMINATION BY MR. O'NEILL:

Q. You were in a bowling league –

A. Yes.

Q. – with the defendant?

A. Yes.

Q. In that regard, did you have occasion to socialize with him and with other white and black people?

A. Yes.

Q. Okay. Like after bowling would you like –

A. After bowling we would go out and have a few.

Q. Okay. Now, you say you know other people who know the defendant?

A. Yes.

Q. Many people?

A. Many people, yes.

Q. All right. Do you know if he has a reputation for [p. 21] being racially biased against African-Americans?

A. Not that I know of.

Q. You've never heard anything to that effect?

A. No.

Q. He's never indicated to you anything to that effect?

A. No.

MR. O'NEILL: Cross-examine.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, has Mr. Apprendi ever had you over at his home?

A. No.

MR. LUTHER: No further questions, Judge.

MR. O'NEILL: One further question.

REDIRECT EXAMINATION BY MR. O'NEILL:

Q. Can you give us a ballpark figure as to how many times you have socialized with him, a ballpark, over the years?

A. Over the years, oh, maybe about 50 times.

MR. O'NEILL: No further questions.

THE COURT: Anything else?

MR. LUTHER: No, Judge.

THE COURT: All right. Well, we can put on the record – but I guess it would be fair to put on the record that Mr. Taylor's Afro – African-American.

MR. O'NEILL: Yes, sir; thank you.

THE COURT: If somebody reads this record later on they'll understand that – his testimony.

[p. 22] MR. O'NEILL: Thank you, sir.

Thank you, Mr. Taylor.

THE COURT: Thank you, Mr. Taylor.

THE WITNESS: You're welcome.

MR. LUTHER: I'm sorry. If I could just have one other question.

RECROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, what was your address?

A. 151 Axtell Avenue.

Q. And what city is that in?

A. Vineland.

Q. Vineland; okay. Thank you.

MR. O'NEILL: Thank you, Mr. Taylor.

THE WITNESS: You're welcome.

MR. O'NEILL: The defense calls Mark Wolfson to the stand.

THE COURT: M-A-R-K.

THE WITNESS: Wolfson. And it's W-O-L-F-S-O-N.

THE COURT: All right. Place your left hand on the Bible and raise your right hand.

MARK WOLFSON, WITNESS, SWORN

THE COURT: Be seated.

DIRECT EXAMINATION BY MR. O'NEILL:

Q. Will you tell us by whom you are employed, Mr. Wolfson?

M. Wolfson – Direct

[p. 23] A. Pfizer Pharmaceuticals.

Q. Do you know the defendant?

A. Yes, I do.

Q. Do you know other people that know the defendant?

A. Yeah, I know a lot of people.

I've known Charlie for 20 years.

Q. All right. How do you know Charlie Apprendi, Mr. Wolfson?

A. We went to college together. We lived together and we've worked together and we've traveled together.

Q. Would you characterize yourself as his best friend?

A. Yeah, for a long time.

Q. Okay. Now, you say you know many other people who know the defendant. Have you ever been in his company where remarks of a racial (sic) – racially-biased attitude toward African-Americans have been made?

A. None. The only reputation Charlie ever had was being a little crazy.

Q. Being a little crazy?

A. Yeah, his nickname in college was Nut-Nut.

Q. Okay. Do you know if he has a reputation for being racially biased against Afro-Americans?

A. No.

Q. He does not?

A. No.

[p. 24] MR. O'NEILL: You may cross-examine.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, it's rather obvious, but for purposes of the record you're a white male?

A. Yes.

Q. Okay. And you knew Mr. Apprendi in college?

A. Yes.

Q. And Mr. Apprendi, in fact, graduated college, is that correct?

A. Yes.

Q. And that was Rutgers University?

A. Yeah.

Q. And it was, in fact, a five-year program in pharmacy; correct?

A. Right.

Q. And he successfully graduated?

A. Yes.

MR. LUTHER: Nothing further.

MR. O'NEILL: You may step down. Thank you for coming, Mr. Wolfson.

The defense calls Joseph Romano to the stand.

THE COURT: Place your left hand on the Bible and raise your right hand.

JOSEPH ROMANO, WITNESS, SWORN

THE COURT: Have a seat.

J. Romano – Direct

[p. 25] DIRECT EXAMINATION BY MR. O'NEILL:

Q. Mr. Romano, by whom are you employed, sir?

A. By the City of Vineland.

Q. In what capacity?

A. Mayor.

Q. Do you know the defendant, Charles Apprendi, Junior?

A. I knew him all his life.

Q. Do you know other people who know the defendant?

A. Quite a few, yes.

Q. Have you socialized with the defendant in the company of blacks?

A. Yes.

Q. On some occasion, a few occasions, many occasions, what?

A. On a number of occasions.

Q. All right.

THE COURT: And the question was has he socialized with the defendant in the company of blacks?

MR. O'NEILL: Yes, sir.

THE COURT: Okay.

MR. O'NEILL: All right.

DIRECT EXAMINATION BY MR. O'NEILL:

Q. Have you ever come to any knowledge that he has any racial bias against African-Americans?

A. Not to my knowledge.

[p. 26] Q. Do you know if he has a reputation among other people for being racially biased against Afro-Americans?

A. I don't think so.

MR. O'NEILL: You may cross-examine.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Again, Mayor Romano, it's obvious you are a white male.

A. Right.

Q. Okay. Sir, isn't it true that you're friendly with the defendant?

A. Yes.

Q. And you have been so for his whole life; correct?

A. Right.

Q. Okay. Have you ever been over at the defendant's home?

A. Yes.

Q. Okay.

MR. LUTHER: No further questions, Judge.

REDIRECT EXAMINATION BY MR. O'NEILL:

Q. Have you ever been at the family home in the company of blacks, like Mel Scott?

A. Yes.

Q. All right.

MR. O'NEILL: No further questions.

THE COURT: Anything else, Mr. Luther?

J. Romano – Cross

[p. 27] MR. LUTHER: No, Judge.

THE COURT: Very well; you may step down.

MR. O'NEILL: The defense calls Charles VanFleet to the stand.

THE COURT: Put your left hand on the Bible and raise your right hand, please.

CHARLES VANFLEET, WITNESS, SWORN

THE COURT: All right, Mr. O'Neill.

MR. O'NEILL: Thank you, sir.

DIRECT EXAMINATION BY MR. O'NEILL:

Q. Mr. VanFleet, by whom are you employed, sir?

A. Winslow's Pharmacy, Vineland.

Q. In what capacity?

A. Pharmacist in charge.

Q. Do you know the defendant, Charles Apprendi, Junior?

A. Yes, I do.

Q. How do you know him?

A. He interned under me in the pharmacy when he graduated from pharmacy college.

Q. For approximately how long have you known him?

A. About 16 years.

Q. Have you ever seen him interact with African-Americans?

A. Yes, I have.

Q. How has that occurred, sir?

C. VanFleet – Direct

[p. 28] A. In the store and upon our visiting restaurants, Charlie and I.

Q. And you've seen –

A. I used to take him on weekends up to Lancaster for eating in a particular restaurant that I like. And he enjoyed it. And there were a lot of black people there.

Q. Have you employed African-Americans at the drugstore?

A. Yes, we have.

Q. At the same time that Charlie Apprendi worked for you?

A. Yes.

Q. Have you seen him interact with black people?

A. Yes, I have.

Q. Have you ever known him to act or say anything in a racially-prejudiced tone or words?

A. No, I have not.

Q. Do you know if he has a reputation for being a racist?

A. No.

MR. O'NEILL: Cross-examine.

CROSS-EXAMINATION BY MR. LUTHER:

Q. So you knew Mr. Apprendi through your work at the pharmacy; correct?

A. Yes.

Q. And how long did Mr. Apprendi work at the pharmacy

[p. 29] with you?

A. In total I would say three or four years –

Q. Okay.

A. – over a period of time. He left the store and came back. He managed one of our other stores and then came back to us.

Q. And isn't it true that he had trouble dealing with the general public at the store?

A. Not to my knowledge.

Q. Isn't it true that at first he was dealing with the general public and then later on he was moved to the back where he really didn't have contact with the general public?

A. No, he managed our store on Main Road. And when that store closed he come over to work for us in the nursing home section downstairs.

Q. True. So he worked in the –

A. That's where he worked. And he also worked upstairs.

Q. Okay.

A. Like at night when I was off or he would cover my supper.

Q. Was he dealing with members of the general public on a regular basis?

A. Off and on. It depended on his schedule.

Q. Isn't it true that later he was really not dealing with the general public much? Rather, he was just filling prescriptions for the nursing home?

[p. 30] A. That was his main job; –

Q. Right.

A. – right; uh-huh.

Q. So his main job in filling prescriptions with the nursing home would not really bring him in contact with members of the general public; is that correct?

A. Not the general public when he was downstairs, no.

Q. Right.

A. But we had other pharmacists doing the same thing downstairs.

Q. Okay. And that earlier in his employment he had more contact with members of the general public; is that true?

A. Yes, he did; uh-huh. Until that store closed.

Q. Okay. And it's true you're friendly with the defendant, sir?

A. Yes.

Q. And although it's obvious, I'll have to ask you for the record: You're a white male?

A. Right.

Q. Okay.

MR. LUTHER: Nothing further, Judge.

MR. O'NEILL: One last one, Judge, if I may.

THE COURT: Uh-huh.

REDIRECT EXAMINATION BY MR. O'NEILL:

Q. Did Charlie Apprendi regularly interact with other

[p. 31] black employees of yours at the stores?

A. Yes.

MR. O'NEILL: No further questions.

THE COURT: All right. You may step down.

THE WITNESS: Okay.

MR. O'NEILL: The defense calls Gary Castellini.

THE COURT: Place your left hand on the Bible and raise your right hand.

GARY CASTELLINI, WITNESS, SWORN

DIRECT EXAMINATION BY MR. O'NEILL:

Q. Mr. Castellini, by whom are you employed?

A. Self-employed.

Q. What do you do, sir?

A. Okay. I – well, actually a co-owner of a farm.

Q. Okay.

THE COURT: A co-owner of a farm, you said?

THE WITNESS: Yes.

DIRECT EXAMINATION BY MR. O'NEILL:

Q. Do you know the defendant, Charles Apprendi, Junior?

A. Yes, I do.

Q. How do you know him, sir?

A. Well, I've been friends with him for – it's over 20 years. And, well, we've bowled together, softball, golfed together.

Q. Do you know other people who know him?

G. Castellini – Direct

[p. 32] A. Yes, I do.

Q. Have you ever interacted with him with African-Americans?

A. Yes, as a matter of fact, he had – well, Miller testified. And Miller was on our bowling league. And we also had a bowler that we were on – Charlie and I were on the same bowling team with a fellow by the name of Olin. And he was a – you know, an Afro-American. And –

Q. Is that Olin Gould, –

A. Yes.

Q. –the auto body owner?

A. Yes.

Q. Okay. Have you ever known him to utter any racially-biased remarks against African-Americans?

A. None that I can say of.

Q. Do you know if he has a reputation for being racially-biased against blacks?

A. No. If anything, I've seen just the opposite.

MR. O'NEILL: Cross-examine.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, for the purposes of the record you're a white male?

A. Yes.

Q. And it's true that you're friendly with the defendant?

G. Castellini – Cross

[p. 33] A. Yes.

Q. And you've been friendly with him for how long?

A. It's a little over 20 years.

Q. All right.

MR. LUTHER: Nothing further, Judge.

MR. O'NEILL: One last question.

REDIRECT EXAMINATION BY MR. O'NEILL:

Q. Were you ever at the defendant's house with blacks?

A. Yes. Well, a couple instances I can give you. Charlie would have – as a matter of fact, I think it was Labor Day barbecues and also Super Bowl parties. And –

Q. With black social guests?

A. Yes

MR. O'NEILL: No further questions.

THE COURT: All right. You may step down.

MR. O'NEILL: Judge Pagliughi.

THE COURT: (Indiscernible – voice too low).

JUDGE PAGLIUGHI: Fine, Judge, and yourself?

MARTIN PAGLIUGHI, WITNESS, SWORN

DIRECT EXAMINATION BY MR. O'NEILL:

Q. Sir, you are retired as judge of the Vineland Municipal Court?

A. That is correct.

Q. Do you know the defendant?

A. Yes.

[p. 34] Q. For approximately how long have you known him, Judge?

A. I'd say since he's been born.

Q. Okay. Do you know other people who know him?

A. Oh, I can say quite a few.

Q. Have you ever heard him or heard of his making racially-biased remarks against blacks?

A. Never have I heard that.

Q. Do you know if he has a reputation for being racially-biased against African-Americans?

A. I would say – I would say no, based on the –

May I add something?

Q. Yes, sir.

A. Before he moved into his present home on the corner of Chestnut and Lincoln, the second house away from his mother and father's house, there were (sic) a black family that lived in that house. But I don't know how many years. And I have on occasions I'd seen him over there fixing a tire or helping them get their car started. So this is what I base my opinion on, that he's not prejudiced.

Q. Thank you, sir.

You may cross-examine him.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, for purposes of the record you're a white male?

A. And Italian, too.

Q. Okay. And, sir, it's true you're friendly with the

[p. 35] defendant for a long time?

A. Well, you have to understand. We lived across the street from them. And when he was born and my children were born – and they grew up together.

Q. Okay. So you've known him basically his whole life?

A. Oh, yes.

Q. Okay. And it's fair to say you're friendly with him?

A. Well, I haven't seen him probably in the last four or five years because we moved out a long – but –

Q. Because he moved?

A. He moved out of town.

Q. It's true he no longer lives – at least in 1994 he no longer lived with his parents; is that correct?

A. Yeah. Well, we were still living in our house, I think, when he moved. Well, when we sold that's when he moved, 'cause he wanted to buy our house.

THE COURT: You sold your house and moved out of town how long ago?

THE WITNESS: Six, seven years ago.

THE COURT: And would it be fair – six or seven years ago. Would it be fair to say that during that last six or seven years your contact with him was not as close as it was before then?

THE WITNESS: Well, that's true.

MR. LUTHER: Nothing further, Judge.

[p. 36] THE WITNESS: But I did have contact with people, you know, that I knew. They all knew Chas. They never expressed any views that he was racial.

REDIRECT EXAMINATION BY MR. O'NEILL:

Q. Then during the time that you were out of town, out of Vineland, you had contact with other people who did have contact with the defendant?

A. Oh, sure. Sure. My children grew up together.

Q. Then you know of no reputation that he has for being racially biased against blacks?

A. None whatsoever.

Q. Thank you, sir.

MR. O'NEILL: No further questions.

THE COURT: All right.

MR. O'NEILL: The defense calls Charles Apprendi, Senior, to the stand.

THE COURT: Put your left hand on the Bible and raise your right hand.

CHARLES APPRENDI, SENIOR, WITNESS, SWORN

THE COURT: All right.

DIRECT EXAMINATION BY MR. O'NEILL:

Q. Now, Mr. Apprendi, you are the father of the defendant?

A. Yes.

Q. Okay. Chas, your son, lived with you and your wife

[p. 37] until how long ago approximately?

A. I'd say he moved approximately five or six years ago.

Q. Okay. Now, during that interim time between the time when he moved and December 22 of 1994, did you see him regularly or not?

A. Oh, yes, he came to our house, for dinner almost every night.

Q. Did you have occasion to have at the family home African-Americans?

A. Yeah. Oh, sure, we had frequent visits. My wife was a teacher and she taught with a lot of African-American teachers.

Q. And did you see your son interact with the black people?

A. Yes, when he was at our house he would interact very nicely with them.

Q. Your son is what, 40 years old?

A. 40, yes.

Q. During his 40 years have you ever come upon any occasion until this arrest on December 22 of 1994 when there was any indication to you at all that he was racially biased against black people?

A. No, never. There's never been any indication. He had Afro-American people at our house. Mel Scott was one. He used to stop by to see us, him and his wife. He

would stop by quite a bit. And I know he was on the bowling team with Olin, the [p. 38] Bowling Booms (phonetic). And they got along fine, as far as I know.

Q. And to your knowledge he has no reputation for being racially biased against blacks?

A. None at all.

MR. O'NEILL: You may take the witness.

MR. LUTHER: No questions, Judge.

THE COURT: All right. You may step down.

MR. O'NEILL: If Your Honor pleases, there are two affidavits in the court file. The Prosecutor has –

Do you have those affidavits from Gould and –

MR. LUTHER: I was out all last week.

MR. O'NEILL: Oh, well, let me show it to him. Fine, that's one.

If Your Honor pleases, the affidavits to which I refer are those of Olin Gould and Mel Scott. I would ask the Court to take judicial notice that both of those gentlemen are African-Americans, so they are part of the court record, as well.

With that the defense rests, Judge.

Except for one witness. And that is our expert witness.

THE COURT: All right. You want to call him, please?

MR. O'NEILL: Dr. Cooke.

Your Honor, while the doctor's approaching the [p. 39] witness stand, I presented to the Court and to Mr. Luther copies of Dr. Cooke's very lengthy CV. Rather than taking the Court's time to go through his CV, I would ask the Court accept that CV as an exhibit. And I will just ask him a couple of preliminary questions. May I do that, Judge?

THE COURT: Mr. Luther?

MR. LUTHER: No objection.

THE COURT: All right.

MR. O'NEILL: Thank you.

THE COURT: Any objection to his being accepted as an expert in the field of psychology?

MR. LUTHER: No, Judge.

THE COURT: Is it clinical psychology?

THE WITNESS: Clinical psychology and forensic psychology.

THE COURT: All right, Mr. Luther?

MR. LUTHER: That's fine, Judge.

THE COURT: All right.

GERALD COOKE, M.D., WITNESS, SWORN

THE COURT: Your full name is?

THE WITNESS: Gerald Cooke – C-O-O-K-E.

DIRECT EXAMINATION BY MR. O'NEILL:

Q. Doctor, at my request did you have occasion to examine the defendant in the Cumberland County Jail back on February 15 of 1995?

[p. 40] A. Yes.

Q. Now, Doctor, what was the purpose of the evaluation as you understood it to be?

A. Well, the primary purpose initially is to understand the psychological functioning and then apply that to an understanding of his reasons for committing the offense. And also to address issues of whether he is the kind of individual who could be easily coerced or influenced during an interrogation to make statements that were not accurate statements.

Q. Doctor, prior to your examination of the defendant and your taking a history and formulating a clinical opinion, did I provide to you various records, such as the Vineland Police Department reports and the indictment and medical notes from the Cumberland County Jail, and also a ballistics reports from the State Police? Did you examine all of those?

A. Yes, you did. And I did review those.

Q. All right. Doctor, did you have occasion to administer any objecting testing to this defendant?

A. Yes.

Q. What tests did you administer? And explain briefly, Doctor, what each of them is.

A. Okay. The first, Your Honor, was the Minnesota Multiphasic Personality Inventory 2, known as the MMPI2. This is the most widely used objective personality test. It's [p. 41] particularly valuable in forensic cases because it has three validity scales that tell us whether the individual is approaching the testing in a candid manner or exaggerating problems that aren't there or denying problems that are there. So it's valuable for that.

It then has a series of clinical scales that provides information on the individual's symptoms, problems, personality dynamics, things of that nature.

I also gave him an incomplete sentences blank. That's a projective personality test. And that is used to get information about conscious attitudes and values, the perception and quality of interpersonal relationships, perceptions of himself, things of that nature.

I gave him the raw shock inkblot technique. That is a series of inkblots. It's also a projective personality test. It's designed to push a little deeper into what some people might call the unconscious. It also reveals underlying conflicts, fears, wishes. And also tells us how accurately the individual perceives reality. And if there are distortions or interferences with perception, what some of the psychological reasons for that might be.

I then also gave him three sub-tests of the Wechsler Adult Intelligence Scale, Revised. And the purpose of that was not only to get a rough estimate of intellectual

functioning – I didn't give the whole test, so what I have is just an estimate. [p. 42] But also to see if there's any interference with intellectual functioning due to emotional or psychological factors.

Q. Doctor, upon arriving at the interview with the defendant, how did he appear to you?

A. Well, both during the interview and during my testing I found him to be anxious. He had what I might call a good deal of nervous energy. But it also went to the extent in terms of his speech. The speed of his speech, his affect or emotional tone, I would describe as hypomanic. And that is that – fast, somewhat pressured kind of speech that's often associated with an affective or emotional tone disorder.

Part of the result of that was that his attention and concentration was not good. He listened very poorly to my questions. And I had to repeat my test instructions or get him to stop and listen. I had to specifically focus him so he would listen to instructions, rather than jumping right into things.

He was self-critical about his responses and performance to the tests. And I also found in giving – in doing the interview portion that he had what I would call obsessive-compulsive traits. And I'll get into that more because those also appeared on both the objective and projective personality testing.

I did not find that he was psychotic. I did not find that he had any schizophrenia or thinking disorder or anything of [p. 43] that nature.

Q. So this defendant is not insane and cannot invoke any kind of an insanity defense or a mitigating circumstances defense; is that your finding?

A. In my opinion that is correct.

Q. All right. Now, Doc, you took a history as you always do; didn't you?

A. That's correct.

Q. And you found as part of that history that apparently his mother is hypomanic and has gastrointestinal problems like he does; is that right?

A. Based on his description – he didn't use the term "hypomanic," but based on his description – of course, I haven't seen her, but it appeared so from his description.

Q. All right. Then you went through his education, the fact he became a pharmacist. And you went through his social history, his dating relationships; did you not?

A. That's correct.

Q. All right. Now, did you have occasion to explore his contact with alcohol and/or drugs?

A. Yes.

Q. And what did you find as to that, Doctor?

A. Well, –

Q. Was there any pattern that you found?

A. Oh, absolutely.

[p. 44] Q. What was that, sir?

A. Well, I always start out by asking how – when they started using alcohol or drugs. He started drinking at age 19. He usually drinks beer, but on weekends he says he would drink vodka and tonics. He told me that he has a low tolerance to alcohol and gets high very fast. And that is very consistent with the testing. There are certain types of individuals with certain personality characteristics that seem to be more susceptible to alcohol. And he has that.

The pattern he described to me was a pattern of alcohol abuse. I couldn't carry it to the next level of saying alcohol dependency, though I suspect that it may be. Part of the reason for that was that he is also simultaneously using drugs. And it's hard for him to evaluate how much of what he experiences is due to alcohol and how much is due to drugs.

He told me he started using drugs at age 21. Primarily opiates and most frequently Lomotil for both pain and depression. He tells me he's used it daily since age 21 to varying amounts. Sometimes a little, but sometimes quite a bit. He's also used anticolon (sic) – anticholinergics. And he says – and he's a pharmacist, I'm not – but he says they have a synergistic effect that one increases the effects of others. I can't comment on that. That's just his indication.

Q. Did you find there was any pattern of drug dependence, Doctor?

[p. 45] A. Absolutely. When you use those kinds of drugs to those (sic) degree daily for – at the time I saw him like 19 years or 18 years, that is clearly a pattern of drug dependence.

Q. Doctor, did you go into the events leading up to the charges for which he has pleaded guilty?

A. Yes, I did.

Q. All right; what did you find in that respect, Doctor?

A. Well, he indicated to me that he had lived in his house for about six years. He did not know when the Fowlkes family moved in. He told me that he did not know that the family that lived in that house was black until he was told that by the detective during the interrogation.

He also says that the detective told him about prior incidents. And he told me he didn't remember committing those acts. What he tells me

Q. That was the month before, I take it, November of '94?

A. That's correct.

As part of taking his history of alcohol and drug use, he told me that he gets violent thoughts whenever he drinks to excess. And he told me that that's what happened on 12/22/94, as well, that he says he had feelings that he wanted to destroy something. He had feelings that he wanted to do something destructive, to do – and he has had such feelings before and has acted on them before. He told me about a prior incident of [p. 46] getting drunk and ripping a gate off a house. Things of that nature.

Excuse me. And he describes what he did as, quote, "An impulsive, destructive thing." He says that the door

caught his attention because it was purple and had a large pane of glass. And he just had the thought to destroy it. And that's why he shot at it. He just had a feeling on the way home from the bar while he was drunk and drug-intoxicated that he wanted to break something. And he told me it didn't matter what it was. And that caught his attention.

Now, I went back with him over the course of his alcohol and drug use during that day. And he indicated to me that it started about 12:30 in the afternoon. And though there were times – there were some times during the day that he drank, sometimes he used drugs and sometimes he did neither. But that overall in the period from 12:30 in the afternoon to around 1 a.m. he believes he consumed approximately eight vodka and tonic.

There were two different periods when he drinks. And he said I – about the first period that he thought he had four, more or less. And the second time three or four. So it could be six, it could be nine. The best estimate is about eight from what he told me.

He also took four to six Lomotil, one Dilaudid and two Ativan.

[p. 47] And he told me that after the shooting he went home, put the gun behind the door of the attic, and went to sleep. And told me that he was in bed about 20 minutes when the police arrived. He told me that during the time he spoke to the police – well, first at the house and later at the station, that he still felt intoxicated from the drugs and alcohol during that time.

He also told me that at first – you know, he acknowledged – I had the records – that at first he told the police he didn't do it. Then he thought if he cooperated with them – his term would be they, quote, "They would be less stringent" unquote, with him. He told me that, for example, he did not know it was a black family. Yet when they told him that he indicated that that's the reason he gave (sic) the shooting – he did the shooting.

He says that he was embarrassed. He says that they pressured him. He was scared. He was anxious. These are the things he told me, but they're certainly highly consistent with my analysis of his personality. And he said the officer basically said to him, "If you make it easier for us, we'll make it easier for you." And so he went overboard, according to what he told me, trying to cooperate with them just to get out of the situation as quickly as possible.

Q. Now, Doctor, can you – do you have an opinion – and by the way, each of the opinions that you rendered in this case [p. 48] must be within a reasonable degree of psychological probability to be admissible in court. I want you to understand that. And have your opinions expressed so far been consistent with that standard?

A. Yes, and –

Q. And if you can't answer any of my questions or the Prosecutor's questions within that standard, within a reasonable degree of psychological probability, you will so tell us or tell the Court; will you?

A. I can, yes. And those apply to my psychological testing, findings and my opinions about the – what I sometimes refer to as the psycho-legal questions.

Q. Doctor, can you tell us within that standard whether the psychological objective testing that you administered was consistent with the information that you obtained from the interview and the history?

A. Yes, it was, absolutely.

Q. And was it also consistent with your clinical impression that you formulated upon meeting him and seeing him during the period of time you were in the jail?

A. Yes.

Q. All right. Now, did that objective testing indicate whether or not there is pathology as to this defendant?

A. Yes.

Q. Okay; what did it indicate?

[p. 49] A. Okay. First of all, he is an anxious individual. And his anxiety interferes with his attention and his concentration. He has an extremely poor self-image, particularly with a person who has his level of academic and occupational accomplishments. The measures we have of identity and self-esteem and self-concept – we find that if a person has achieved academically and occupationally that they generally have a stronger self-image. And his is very weak, despite that. Along with anxiety. He is very insecure. He's a very sensitive person. He feels very inadequate and insecure as a man. And part of what happens, I think, with these violent thoughts is a way of compensating for those feelings of inadequacy.

I also mention that on interview he showed some obsessive-compulsive traits. And that was evident on the testing, as well. What that means is he tends to have a

very rigid personality structure. He's very concrete. He's very literal. He also is literally obsessed with collecting things and accumulating things. Part of obsessive-compulsiveness is also perfectionism or a desire for perfectionism. And I think what happens is that he sets certain goals for himself that are beyond his reach, so they're not possible for him. And then when he cannot reach them he ends up having sort of chronic ongoing feelings of dissatisfaction and anger.

He also tends to project his problems. So rather than, for example, seeing his own contribution through relationship [p. 50] problems with women, for example, he tends to project the problems onto others. Saying, for example, "Well, it's the fault of other men. They interfere. They're jealous of me." Things of that nature.

He does not have a very positive view of people. He generally anticipates that people will be annoying, dishonest, things of that nature. I think he has never felt that he fits in with people. He says that he was very shy and bashful as a child. And the testing shows that he's very fearful of rejection from other people, particularly women.

He has a high tension level. He's got a low frustration level. A low level of – low tolerance from both frustration and anger. Little things that wouldn't bother most people, as a result, annoy him. And in taking his occupational history, for example, he did indicate to me dealing with people on a day-to-day basis – the things he complained about were the things that we all deal with on a day-to-day basis; people being impatient, people wanting to get waited on quickly. Things of that nature.

Yet, because of his chronic tension and because of his obsessiveness, he had a great deal of difficulty dealing with that.

The testing also shows that his anxiety has what we call a somatic component. That is –

Q. What do you mean by that, Doctor?

A. – that is, it comes out in physical symptoms. [p. 51] Gastrointestinal symptoms, as well.

Q. Is that the reason he was taking the drugs you indicated earlier, the Lomotil and the Dilaudid, and so forth?

A. Well, that's the reason he gives that he was taking the drugs. In part, for the pain and the physical symptoms. In fact, though I don't think he has insight into it completely, the drugs also helped him blot out a lot of these kinds of feelings I'm talking about, so that he didn't have to live with them day to day. And so that that high tension level that he constantly felt could be reduced by the drugs.

The testing also suggested that he would go through cycles. Part of that will be that at times he'll have this sort of hypomanic nervous energy and do a lot that I mentioned. And other times he'll be depressed and lethargic. I also see a cycle in terms of having these sorts of angry kinds of thoughts and then drinking and doing something and then feeling genuine remorse and guilt afterwards. But not having the coping mechanisms to deal with what caused it in the first place. So even though he is remorseful and doesn't want to do it again, the tension builds up again and the cycle repeats itself.

I already mentioned he has to be concrete, very literal and very precise. And that need within him leads to distortions in perception. There are also distortions in perception due to his concerns about masculinity, his feeling inadequate as a man. And when these kinds of feelings arise he [p. 52] shows interference with not only the control of his feelings and his thoughts and his behavior, but also with his ability to perceive things accurately, to concentrate. Things of that nature.

Q. Doctor, let me ask you this: What, if anything, does the objective testing suggest in terms of anger or handling anger?

A. He exists at two levels. His personality is not well integrated. On the outside he has this obsessive-compulsive sort of thing which leads to overcontrol of the anger. But underneath the testing shows there's a great deal of anger. And what happens is that when he overdoes the drugs or the alcohol, particularly alcohol, or is in an emotionally-arousing situation, then we call the process disinhibition. The angry impulses that are usually inhibited and overcontrolled are disinhibited. That's when they emerge. And that's when he does the kinds of things that led to these charges.

Q. Doctor, did you come to a diagnosis of this individual?

A. I came to six diagnoses of him, yes.

Q. Well, what are they, sir?

A. The primarily diagnosis is obsessive-compulsive disorder. The second is psychlosymic (phonetic) disorder. Now, –

Q. What does that mean, Doctor?

A. Yeah. Most people are familiar with the term "manic [p. 53] depressive or bipolar." Psychlosymic is similar, in that the individual's moods go from being excited and hypomanic and elated to being depressed and lethargic. But the swing is not as great and the impairment is not as great as in bipolar disorder. Drug dependence, alcohol abuse –

I also diagnosed an impulse disorder of kleptomania. I know Your Honor is aware of the accumulation of guns, ammunition. But also various other tools, metallic objects. And he has had an obsessive need to accumulate things to the point where he has shoplifted even things like nuts and bolts. And, again, this is a man who feels so vulnerable and inadequate that there's like a void inside of him. The more things he can collect and accumulate the more he thinks he's filling that void. But since the void is physiologically based it never really satisfies him.

Q. Doctor, let me ask you this: Is there any way of knowing for what period of time the defendant has suffered from these disorders?

A. Yes.

Q. Can you tell His Honor?

A. Yeah, not in terms of an exact date, but most of these kind of disorders have their roots by late childhood, early adolescence, and develop from there. As far as the obsessive – compulsive disorder and the psychlosymic disorder, certainly by early adulthood.

[p. 54] I've already indicated that based on his own report the pattern of alcohol abuse began at around age 19 or 20, and of drug abuse at age 21.

Q. So then the fall and winter of 1994 he was suffering from these disorders?

A. Absolutely.

Q. All right. Now, what synergistic effect is there on the ability to exercise judgment and opinion for an individual such as this one?

A. Well, you've got – you've got two things operating in a – or three, really. You've got the synergistic effect of the various drugs and the alcohol. You've got the combination with an individual who is anxious and overcontrolled, but who is disinhibited under the effect of those drugs and alcohol. And you've got an individual who when he becomes emotional also shows interference. So all three factors really combine into fear of judgment and reasoning and impulse control.

Q. Doctor, let's talk about the statements that Charles gave to the police. Now, is there a way of your knowing whether Charles, as opposed to an average, normal human being, would be more likely, less likely, or as likely to be misled by someone who was questioning him in a controlled atmosphere, like a police station or an atmosphere where police were around? Can you tell His Honor?

A. Yes, absolutely we can.

[p. 55] And the basis for that is this, Your Honor. Anybody can tell me anything. And I've, you know, evaluated literally thousands of people that have been

interrogated by police. And they can tell you, you know, the whole range of things. I'm sure Your Honor has heard them.

What I look for is a consistency between what an individual tells me and what I find on the testing. So anybody can say, "I was coerced, I was influenced." But there are some people who clearly have the personality structure where that's not the case. And there are others that do have that personality structure.

Here we have a very anxious man. One who feels very vulnerable. One who feels very inadequate. And one who would say or do just about anything to get out of a frightening anxiety-arousing situation.

Q. Even tell a lie?

A. Tell somebody a lie if it was what he thought that person wanted to hear in order to stop the interrogation and let him out of the situation.

Now, let me say, Your Honor, I don't know what the truth or falsity is. That's not my role. I'm only saying that he has the kind of personality of an individual who would do that to get out of this kind of situation.

Q. Thank you, Doctor.

MR. O'NEILL: You may cross-examine.

G. Cooke – Cross

[p. 56] MR. LUTHER: Thank you.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, are you a psychiatrist?

A. No, I'm a psychologist.

Q. Do you have a medical degree?

A. No, I have a doctorate in psychology.

Q. In psychology; –

A. That's correct.

Q. – okay. Sir, would you agree that psychology is not an exact science?

A. I would agree.

Q. Isn't it true that two different psychologists could reach completely different opinions based on the same facts?

A. That depends. That depends on when you use the term "facts," whether you're talking about psychological symptoms or facts in a criminal case of a – of a – of a factual as opposed to an opinioned nature. You'd have to clarify that a little for me.

Q. Okay. Let's say two psychologists were asked to evaluate a patient.

A. Yes.

Q. Isn't it true that they could come up with different analyses?

A. Okay. That's why I said that the answer to that question is it depends on the nature of the illness. There's well-[p. 57] documented research – it's actually contained in the DSM4, the most recent one – that the reliability of diagnosis varies depending on the type of disorder and its severity. So in some cases psychologists can see the

same patient and disagree markedly. In other cases there's almost a hundred percent agreement. It depends on the nature and severity of the pathology.

Q. So you would agree that two different psychologists can come up with different diagnoses on the same patient?

A. In some cases, yes.

Q. Okay. Sir, how many times did you meet with the defendant prior to today?

A. One time.

Q. Okay. And what did – you learned about his educational background; is that correct?

A. Yes.

Q. In fact, he did very well in high school; isn't that true?

A. I believe that's correct, yes.

Q. He received high grades in high school?

A. I'd have to go back to check the exact grades, but he told me he was a good student.

Q. Yes. And, in fact, he went to college, as well; is that correct?

A. Yes.

[p. 58] Q. And, in fact, he graduated Rutgers University?

A. Yes.

Q. And he completed not a four-year study, but a five-year study in pharmacy; is that correct?

A. Well, the pharmacy program is five years. He indicated to me that it took him six years to complete it because at various points he didn't take it seriously and had to take extra time.

Q. But he did graduate with a degree in pharmacy; correct?

A. Yes, he did; that's correct.

Q. Okay. And isn't it true that you also administered some testing with respect to his IQ?

A. That's correct.

Q. And you found that his IQ came out as a prorated verbal IQ of a-hundred-and-four, which is in the average range and at the 61st percentile of the population; is that correct?

A. That's correct.

Q. However, you also concluded that anxiety is currently interfering with his attention and concentration. And that it is likely that his potential lies at an IQ of approximately 110, which is at the 75th percentile, and is more consistent with his academic accomplishments; isn't that correct?

A. Yes.

Q. So it's fair to say that Mr. Apprendi is an intelligent individual?

[p. 59] A. Yes.

Q. Okay. Did Mr. Apprendi ever have any previous treatment for any psychiatric disorders?

A. No. I questioned him about that. He told me that he felt he needed it and probably should have, but that he has never gone.

Q. Did he ever have any previous institutionalizations for any psychiatric disorders?

A. No.

Q. Did he have any previous treatment for any alcohol rehabilitation?

A. No.

Q. Did he ever have any previous treatment for any drug rehabilitation?

A. No.

Q. And, in fact, in 1994, at the time of these crimes, he was employed as a pharmacist; was he not?

A. Yes.

Q. And, just briefly, what does being a pharmacist entail?

A. Do you mean what are the job –

Q. What are the –

A. – duties of a –

Q. Very briefly, what are the job duties of a pharmacist?

[p. 60] A. There I suppose I'm a layman, like the rest of us. I – as far as I know from just personal contact,

the mixing of various drugs, preparing the drugs, being knowledgeable about their effects in order to both put on labels and to inform people of their side effects and what you shouldn't take with what and so on.

Q. It's a very responsible position; is it not, Doctor?

A. I would say it's a – a – a position that certainly should be taken very seriously and responsibly, yes.

Q. Okay. Is this defendant psychotic?

A. No.

Q. Is he schizophrenic?

A. No.

Q. Was he the victim of any childhood abuse?

A. Not to my knowledge, no.

Q. Okay. You've indicated that this defendant is easily led; is that correct?

A. Yes.

Q. And that in your opinion, based on a reasonable degree of psychiatric (sic) –

A. Psychological.

Q. – certainty – or psychological certainty, you believe that he just admitted to the police what they wanted to hear; is that correct?

A. Well, what I'm saying to you is that his personality is [p. 61] consistent with an individual who in an interrogation situation where his anxiety would be aroused is the kind of person who would just – you know,

in his own mind he'd be saying to himself, "I've got to tell them whatever they want to hear so I can get out of this. Get –

Q. Okay.

A. – out of this situation. It's overwhelming."

Q. So that in your opinion if this defendant was told by the police that there were four prior shootings, that he would admit to those four prior shootings; correct?

A. It's my opinion that he would focus in on what he thought they wanted to hear. If – if he felt that they wanted him to admit to prior shootings then he would.

Q. Okay. Sir, how many prior shootings did this defendant admit to you? Strike that.

How many times did this defendant admit to you that he fired a weapon at the Fowlkes residence?

A. He indicated to me that the only one he remembered doing was 12/22 of '94.

Q. Okay. So in your interview with him he only admitted to doing one shooting; is that correct?

A. That's correct.

MR. O'NEILL: Well, excuse me. I think the word was "remembered."

THE WITNESS: Remembered.

[p. 62] THE COURT: Very well.

CROSS-EXAMINATION BY MR. LUTHER:

Q. He only remembered one shooting?

A. That's what he indicated to me, yes.

Q. Okay. Didn't he specifically tell you that he admitted to doing another shooting on a prior occasion because he wanted to get the interrogation over with and didn't care what he said?

A. Yes, that's what he – he says he told the police that to get the interrogation over with. But he told me that, in fact, he never remembered committing the act that he told the police he did, the prior act.

Q. Okay. Sir, are you aware that since you've spoken with this defendant that this defendant has pled guilty under oath before this Court to a total of two shootings at that residence?

MR. O'NEILL: Objection; irrelevant.

THE COURT: Well, no, I don't think it's irrelevant.

MR. O'NEILL: He's already testified that he admitted telling the police he did a previous shooting, although he didn't remember it. So how's the relevance as to what he's pleaded guilty to?

THE COURT: It goes to the consistency of what the doctor says is his personality of avoiding unpleasant situations that he'll (indiscernible – voice too low) truths.

[p. 63] MR. O'NEILL: Very well, sir.

THE COURT: I think that's where the Prosecutor's going.

MR. LUTHER: Yes; thank you, Judge.

THE COURT: Go ahead.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, were you aware that this defendant, since he spoke with you, has admitted under oath to this Court to two prior shootings at the same residence?

A. Two prior shootings?

Q. Yes.

MR. O'NEILL: Excuse me. The plea was to two shootings in total, not to three.

MR. LUTHER: Two shootings in total; that's correct.

MR. O'NEILL: So it's not two prior shootings to this. It's one prior to this and this; two. Am I right, Mr. Luther?

THE WITNESS: That – that was my confusion. I thought he had pled guilty to one prior shooting and this shooting, yes.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Okay.

A. I had become aware of that, yes.

Q. Sir, isn't it true that the reliability of your opinion depends at least in part on the truthfulness of the [p. 64] defendant?

A. I'm always asked that question. And the answer is no, because my opinion – and I've been very careful to – to describe it this way – is that what he tells me is

consistent with my test findings. I don't know whether he's telling the truth or not. And I don't use that. That's not for me. That's for the Judge or a jury to determine. And I don't use that at all. He can tell me anything. But he can't have the tests come out any way he wants them to. And so it's the tests I rely on.

Q. So your testimony is that it's irrelevant what this man tells you as to whether or not it's truthful?

A. In a sense, yes, because I have no way of knowing what's truthful and what's not. No psychologist – a psychologist can talk about an individual's general tendency to be honest and truthful versus dishonest and manipulative. But no psychologist can say in any one instance whether an individual is telling the truth or telling a lie. We're all capable under certain circumstances, no matter what our personality is, of telling a lie. And that's why psychology has never been able to sort that out about a single instance.

Based on that, people who are trained in forensic are basically trained and experienced to say, "You know, look at his thought processes as he talks to you. Look at his emotional responses. Look at the things that indicate how he [p. 65] might see himself or others. But don't draw an opinion about the truth or falsity of what he tells you, because we can't do that." We have no more ability to do that than a lay person.

Q. Obviously, sir, there's no way you can tell whether or not Mr. Apprendi was truthful with you; correct?

A. That is correct.

Q. Sir, my question is: Isn't it true that the reliability of your opinion depends at least in part on the truthfulness of what Mr. Apprendi tells you?

A. Again, the answer is no. My opinion –

Q. Well, sir, wouldn't it be better than not to –

MR. O'NEILL: Well, he didn't finish. Excuse me, counsel.

THE COURT: No, he's answered the question. Go ahead.

MR. LUTHER: Thank you, Judge.

THE COURT: The answer's no.

The next question.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, wouldn't it be better than to simply not even interview the defendant?

A. No, because as I said there are other things you're looking for in the process of interview. Not so much the content of what the person says – the same thing is true with the history. But I look at the way he relates to me, his [p. 66] thinking processes, his emotional responses.

For example, if I'm talking to a person about what happened to them, whether it's the (sic) criminal case or something else, and they get very anxious and upset and flustered, that information that I have is very important. On the other hand, if they're very cool and aloof and distant, that information is important. Both of those are

important, independent of the content of what they've told me.

Q. So what you're –

A. And that's why we do interviews.

Q. – so what you're looking at is the test results and the demeanor. And the content of what the man says is not important?

A. Content is relatively unimportant. I think I said this in my direct testimony. Anybody can tell you anything they want. I have (sic) people walk in and told me, you know, "I heard a voice of God telling me to do it." Now, that content is unimportant to me unless when I test them and evaluate them I find that they're psychotic. And I find that they have other behaviors consistent with a psychotic disorder. Then the consistency becomes important. But what they say in and of themself does not.

And the same thing applies here.

Q. So it would have no impact on your opinion at all the fact that he told you that he did one shooting and told Judge [p. 67] Ridgway that he did two shootings; correct?

A. That's not exact –

MR. O'NEILL: That's not – that was not the testimony, Judge. The testimony was that he told the police he did a shooting previous to this one, but he didn't remember it. That was his testimony.

MR. LUTHER: Judge, it was more than that. He told the doctor and the doctor acknowledged that Mr.

Apprendi specifically told him that he admitted to one prior shooting to "get the interrogation over with and didn't care what he said." I'm reading from the gentleman's report.

THE COURT: Ask him the question. What's the question?

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, is it your testimony that it doesn't effect your opinion at all, the fact that Mr. Apprendi told you that he did one shooting and told Judge Ridgway that he did two shootings?

A. Again, the premise is incorrect. That's not what he told me. He told me that he told the police that he had done a prior shooting. He told me that he didn't remember doing such a shooting, but that he did tell the police that he had.

Q. Fine.

A. I – I – I can only tell you what he told me, as far as that goes, –

Q. He told you –

[p. 68] A. – that he didn't remember doing a prior shooting, though he told the police that he had done one. And, again, I don't know whether that's a truth or a lie.

Q. Okay. Sir, he told you he had only done one shooting that he recalled; is that correct?

A. That he recalled; that is correct.

Q. Now, he told Judge Ridgway under oath that he did two shootings. Are you aware of that?

MR. O'NEILL: Judge, I'm going to object. This is badgering. We've been over this now several times, the same content.

MR. LUTHER: Judge, I'm simply trying to get the witness to answer –

THE COURT: Objection overruled. The objection's overruled.

Go ahead.

MR. LUTHER: Thank you.

THE WITNESS: I am aware of that.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Okay. You're aware that he told you that he did one shooting and he told Judge Ridgway he did two shootings?

A. I'm aware that –

Q. Does that have any effect at all on your expert opinion today?

A. There are two factors to that. And one of that (sic) is [p. 69] that he told me, first of all, that he remembered doing the one shooting. I don't know what has convinced him, in terms of whether legal advice, evidence, or whatever, to say – despite that to the Judge that he has had – you know, that he committed a second shooting. I don't know. I can only go with what I have. I didn't come back to him and say, "Well, how come you told me you only remembered one but you pled guilty to another?" I don't know what reasoning or legal advice or evidence either led him to admit it, even though he may

not still remember it, or led him to remember it subsequently.

Q. Sir, do you understand my question?

A. I believe I do.

Q. Okay; could you please answer it?

A. I think I have.

MR. O'NEILL: Well, I object to that, Judge.

THE COURT: No. No. No. No, he's answered the question the way he thinks is an appropriate response.

Mr. Luther, if you want to rephrase the question, go ahead, do so, but don't argue with the witness.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, would it have any effect on your opinion at all the fact that he told you that he fired once at the home and he told Judge Ridgway that he fired twice at the home?

A. In terms of my opinion about his diagnosis, absolutely not. It's totally independent of anything he's told me. In [p. 70] terms of whether he has the kind of personality of someone who is easily coerced or led in an interrogation situation, again the answer is no, because he has a personality consistent with that. It would not effect those opinions.

Q. Okay. And in your interview with Mr. Apprendi he indicated to you that he fired at the door because it was purple; correct?

A. Well, no, it caught his attention because it was purple and had a large pane of glass. That's what he told me.

Q. And that was his reason for shooting at the door?

A. Well, he said he felt destructive. He said he had the same feelings he often gets when he drinks too much. He had these violent feelings. And then that is what attracted his attention. And so that is what he shot at.

Q. Okay. And in your interview with Mr. Apprendi, Mr. Apprendi also admitted to you that he lied to the police at first by denying that he had done the crime at all; is that correct?

A. That is correct.

Q. And that later on he told the truth by admitting firing at the home; is that correct?

A. That is correct.

MR. LUTHER: I have nothing further, Judge.

THE COURT: Anything else?

MR. O'NEILL: Nothing further, Judge.

[p. 71] THE COURT: Very well; thank you. You may step down.

THE WITNESS: Thank you, Your Honor.

THE COURT: Any other witnesses?

MR. O'NEILL: May I have one minute, Judge, or half-a-minute, please?

THE COURT: (No verbal response)

(Whereupon defense counsel and client conferring)

MR. O'NEILL: The defendant will testify, Judge, briefly.

THE COURT: Well, wait a minute. If he's going to testify we're going to take a short recess, 'cause I don't know how brief it's going to be, due to the fact that Mr. Luther –

MR. O'NEILL: For me it'll be brief.

THE COURT: – has to cross-examine. All right.

MR. O'NEILL: Thank you, Judge.

THE COURT: We'll take a 15-minute recess.

(Whereupon a brief recess was taken at this time)

(Whereupon Judge Ridgway briefly dealt with an unrelated matter at this time)

THE COURT: Are you going to examine your client from up here or are you going to go back and sit down?

MR. O'NEILL: I'd like to sit down here, Judge, but I'm not going to do that.

MR. APPRENDI: Well, I'll stand up.

[p. 72] MR. O'NEILL: Can you squeeze in there?

MR. APPRENDI: (Indiscernible – voice too low) on the Bible.

THE COURT: Sheriff, – (indiscernible – voice too low).

All right, Mr. O'Neill. –

MR. O'NEILL: Thank you, Judge.

THE COURT: Put your left hand on the Bible and raise your right hand.

CHARLES APPRENDI, JUNIOR, DEFENDANT, SWORN

THE COURT: And your first name is?

THE WITNESS: Charles.

THE COURT: Charles.

DIRECT EXAMINATION BY MR. O'NEILL:

Q. All right, Charles. Sit down, relax. How do you feel now?

A. Oh, a combination of anxiousness and upset.

Q. Okay. I'm going to ask you questions. Not many. Just answer them the best you can; okay?

A. Yes.

Q. If you don't understand my questions or Mr. Luther's questions or the Judge's questions, just tell us. We'll try to make them understandable to you; all right?

A. Okay; thank you.

Q. Okay. Let's go back to December 22 of 1994. Do you [p. 73] remember what condition mentally and physically you were in when the police arrived at your house at 3 o'clock or so that morning.

A. Well, I guess the best way to describe it was like – it was a strange sensation. I was – I wasn't thinking. I had thought – I knew what I had just done. I – I was like in – in a cloud somewhere. I was extremely exhausted and depressed and everything else. I was just – I was just like there but I wasn't there. I wasn't physically – I didn't look like I was physically drunk because, you know, I wasn't staggering or making bad sounds or anything like that. But it was more mental – the mental state is more important.

Q. Why? What you had just done? You mean the shooting?

A. Yes.

Q. You knew you had done that?

A. Yeah. And –

Q. Okay.

A. – I was upset immediately. I just didn't know what I was doing.

Q. Now, approximately how long after you got home after the shooting was it that the police arrived? Can you tell us that?

A. I don't think it could have been longer than 15, 20 minutes, –

Q. Okay.

[p. 74] A. – something like that.

Q. Where had you been before the shooting?

A. At the Greek Island Restaurant and Bar in Vineland.

Q. Okay. Just very briefly can you tell us if you remember what you had to drink and what, if anything, you took in terms of medication that date?

A. Well, I – it's – the exact count is hard to tell. But I started very early in the morning. Usually every – almost every morning I had to take a couple Lomotil because of the pain in my abdomen.

Q. You have a gastrointestinal problem?

A. Yes, they – they say it's irritable bowel syndrome, nerves and –

What else do you take, if anything?

A. And – well, then I went to another restaurant, the Windjammer, about 12:30. And I had some – I had some drinks. I had like three or four drinks there, vodka and tonic. And then after that I got very sick to my stomach. And that's when I took a lot more other medication. I took a couple more Lomotil. That didn't seem to help.

Q. Well, you're a pharmacist. What does Lomotil have in terms of an effect on the one who takes it? What's the purpose of it?

A. Well, the basic effect is a sense of euphoria. But it also has the secondary effect of stopping spasms in the

[p. 75] gastrointestinal tract.

Q. What other drugs, if any, did you take?

A. I took one Dilaudid, I think, which is also an opiate. And then a little bit later I took two more Ativans.

Q. And what's the effect of Ativan?

A. That's a minor tranquilizer.

Q. All right. Did you have anything else to drink or in terms of medication before this shooting event?

A. Oh, yeah, I – later on that night – that's the reason why I took so much medication, because I wanted to go out to another Christmas party. And I ended up not staying there. Then I went to the Greek Island where Gary was and –

Q. Gary Castellini?

A. Gary Castellini.

And I had – I had another maybe three, four, five or – five drinks or something like that. And then when I got home the incident I had a – I took a couple more Ativans to help me sleep.

Q. Then you went to bed?

A. Then I went to bed, yeah.

Q. And then the police came?

A. Yeah. Yes.

Q. And they questioned you? And this was about 3 in the morning or something?

A. Yes.

[p. 76] Q. Okay. And then they took you down to the station where you were questioned a second time around 6 in the morning by Detective/Sergeant D'Augostine; is that correct?

A. Yes.

Q. All right. Now, before you were questioned by Detective/Sergeant D'Augostine, did you know that there was a black family living in the neighborhood?

A. I had occasion (sic) before. I knew there was – I thought there was a couple black families on Chestnut Avenue out to the – further east of my parents house.

Q. Do you know the Lake family?

A. I don't – I don't know them by name. All I remember is I knew there was a black family. It was like a little green house on the north side of Chestnut Avenue. And it had like a – I think he had like a – like a Mexican with a wagon wheel or something like that. That's all I remember about the house. I think there was some brick in it. But –

Q. The blacks lived there?

A. – I did know, yeah. Yeah. I didn't know their names, that's all.

Q. Were you aware of the Vineland State School home on East Chestnut Avenue where there were blacks? Are you aware – were you aware of that?

A. I knew where it was, yes.

Q. Okay. Now, let's get back to the interrogation by [p. 77] Sergeant D'Augostine in the police station about 6 a.m. Who first mentioned the word "race or racial?" or who first injected the term "race" into the inquiry by Detective/Sergeant D.'Augostine of you?

A. Detective D'Augostine did.

Q. Do you remember what he said to you in that respect?

A. Yeah, I can remember almost exactly what he said. He said – he said, "Were you aware that there was a black family in that house?" And then –

Q. And what was your response?

A. – and then I said – I said, "No, what's that have to do with it?"

Q. And what did he say, if anything?

A. Well, he left (sic) it go for a little while. But he kept on asking me the same thing. That's what – that's what kind of like led me to believe that he was hunting for a racist motive for what I did.

Q. After you said to him, "What's that got to do with it," meaning race, what did he say, if you remember?

A. Nothing.

Q. Okay. But he kept coming back to it?

A. Yes.

Q. All right. Did there come a time when you told Detective D'Augostine that you shot up that house, the Fowlkes house, because you wanted to keep people –

black people out of [p. 78] the area or something to that effect?

A. That's what I told him, but it wasn't true.

Q. Well, why'd you tell him that?

A. Because I was – I was very scared, very out of – irrational. And he had – he made some – he made some threats. And –

Q. What do you mean by threats? What did he say to you?

A. Well, he made it sound like if I cooperated with him and said, like, is – this is the way I took it, anyway – and said what he wanted me to say, that he would take it easy on me if I took it easy on him.

Q. Well, what kind of threats did he make to you? Tell me and tell the Judge specifically.

A. Okay. Specifically, there was a lot of smaller things. But he started on telling me how bad jail was. He mentioned three things that – that really scared me even more. The first thing was that he told me that there was a combination of a lot of homosexuals and AIDS in jail. And he said something like – like, "A pretty little thing like" – this is exactly what he said. He said, "A pretty little thing like you is going to be taken advantage of." And when you – when you think about – at least when I thought about the combination of homosexuals and AIDS and if I – if I contracted AIDS I know what the result of that is. That's the first thing he said to scare me.

[p. 79] And then he said that – he said that if he charged me with a racial crime against a black family – he

told me how – there was a very large percentage of the population of – of prison was blacks. And he said – he said, "At best, you're going to be like worked over or beat up quite often when they find this out." And nobody was going to protect me. And that just –

And then, like I said before, after that he told me that if I cooperated with him he would try to make it easier on me. He said –

Q. So you lied?

A. Yes.

Q. And you knew you were telling a lie to him?

A. Yes, I did. But what I didn't know about the – about *Miranda* was I thought if you had gave a statement you had to sign it or get it recorded. So I thought that I was just like being slick by doing it like that, just to get the interrogation over with. So –

Q. So, in other words, –

A. – I just said it. I just said it.

Q. – you didn't sign the statement or give a reported (sic) statement – you could get out of the interrogation and it wouldn't hurt you?

A. That's what I thought, yes. That was it. Like I said, I wasn't irrational, but that's the way my – my thinking process [p. 80] was going on.

Q. Did you tell Detective/Sergeant D'Augostine what you have told the Judge as to what you were drinking and taking in terms of medication?

A. Yes, I did, exactly. And I also named the name of the drugs and the strengths. And the fact that I was drinking vodka and tonics. I told him exactly what restaurants I was at and who I was with. I tried to – I – I – I tried to say – I was signin[illegible]ything and trying to cooperate with them just so I could, like, get out. But I – I tried to – I let them in the house. I signed a search warrant. I mean, I allowed them to search my house. I basically was just doing anything they wanted me to do.

Q. You signed a paper allowing them to search the house?

A. Yes.

Q. Okay. By the way, did Detective/Sergeant D'Augostine ever give you any statement or report of what you had told him and asked you to read it and sign it?

A. No, he did not.

Q. Are you a racist?

A. No, sir.

Q. Did you have any racist material in your home by way of literature, videotapes, books, of any kind, newspapers?

A. I did not have anything like that at that time or ever in my life.

[p. 81] Q. Are you a member of any racist group, like the Ku Klux Klan, Skinheads, Neo-Nazis, or anything of that sort?

A. No, I am not at the present time and never in my life have I been.

Q. Let me ask you this: You've heard all these witnesses. You've heard white people, black men, a couple affidavits of black men. Is it fair to say that you've had a lot of interaction both socially and at work with black people?

A. Well, I can't – it's hard to say a – percentage-wise, but a certain percentage with – no, never any problems, never. And I've had – I've always had a couple black friends. Even in – in high school, if you could go back to high school. College, we had black people in the fraternity.

Q. You heard one of the witnesses, did you not – I believe it was Judge Pagliughi – mention that you had gone to a black neighbor's home to fix a tire for him or something. Do you remember that incident?

A. Yeah, I did.

Q. Now, have you ever harbored any bias against African Americans?

A. No.

Q. Have you told people anything of a negative nature about African-Americans?

A. No.

MR. O'NEILL: Cross-examine.

[p. 82] CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, you mentioned some drugs that you took on the day and the night in question. They were Lomotil or Lomodal (sic)? What was the name of that drug?

A. Lomotil. Lomotil. That's close enough.

Q. Okay. And that would stop spasms in your gastrointestinal tract?

A. Yes.

Q. Did you ever take that before you went to work at the pharmacy?

A. Yes.

Q. Okay. You also mentioned that you had taken some Ativan. And that's a mild tranquilizer?

A. A tranquilizer, yes.

Q. All right. Had you ever taken that before you went to work at the pharmacy?

A. No, I only took it usually at night to help me sleep.

Q. Okay. And what other drug did you mention that you had taken on the day in question?

A. Dilaudid.

Q. And what does that do?

A. That's a very potent opiate that is for use for severe pain. I had some left over when I had a kidney stone and that's what I had in the house.

Q. And when did you take that?

[p. 83] A. About maybe 8 o'clock, something like that.

Q. And that'd be 8 o'clock on December 21, 1994?

A. 21, yes.

Q. 8 p.m.?

A. Yes.

Q. And that was used for pain?

A. Yes.

Q. And in the course of your employment at the pharmacy had you ever taken that drug before going to work?

A. No.

Q. Had you ever taken it at work if you had pain?

A. Dilaudid –

Q. Yeah.

A. – or Lomotils? Dilaudid, no. It's – I never took that.

Q. Okay. But you did take –

A. I had to take some Lomotil once in a while at work, yes.

Q. All right.

A. But never any tranquilizers.

Q. And you took the Dilaudid at 8 p.m.?

A. Oh, about. You know, I didn't –

Q. Okay, roughly.

A. – look at the clock.

Q. Right.

A. Roughly 8, 9 o'clock, something like that.

Q. And the –

[p. 84] A. Just not too long before I went to the bar.

Q. Okay. The Lomotil, when did you take that?

A. I took some in the morning and then I also took some, I'd say, a little bit earlier than the Dilaudid, maybe 6, 7 o'clock, something like that. It wasn't – it wasn't really effective enough, so I wanted to take something else because of the – I still had the pain and I wanted to go out that night.

Q. All right. And then you took the two Ativan when you got home after shooting at the door; right?

A. Yes.

Q. And that was to calm you down?

A. Calm me down, help me sleep.

Q. Okay.

A. Help me sleep, mainly.

Q. All right. Now, when was the last drink that you had on December 21, around midnight?

A. No, I left the bar about 1:30. I was drinking right up 'till 1:30.

Q. Okay. Did you tell Detective D'Augostine that you left the bar at about midnight?

A. No, sir. He never asked me what time I left the bar. I never told him anything.

Q. Okay. So what time did you have your last drink, 1:30?

A. About 1:30.

[p. 85] Q. And you spoke with Detective D'Augostine.

The *Miranda* card shows that you were *Mirandized* at 6:04 a.m. Do you agree with that?

A. Yes.

Q. So at the time you spoke with Detective D'Augostine you were not drunk; correct?

A. Legally or state of mind or anything else?

Q. Did you feel drunk when you spoke with Detective D'Augostine?

A. I was very dizzy and I was just – it's more of a state of mind. A lot of people don't realize in this case what happens when you take opiates and alcohol and you combine them. You don't get drunk like you're staggering around, or you can't say the alphabet or anything like that. It's like a – a stoned drunk. It's a much different type of intoxication than what classically people think when they're intoxicated. I was out of it. Believe me, I was out of it. I wasn't – I was not using my –

Q. I see.

A. – head, I wasn't thinking. I was –

Q. So the –

A. – irrational.

Q. – the last opiate that you took was at 8 p.m., which was ten hours before you spoke with Detective D'Augostine; is that correct?

[p. 86] A. Yes, but I was so exhausted at that time it didn't matter what I was taking. I was very down and depressed and scared, especially after he threatened me.

Q. Well – and the last time (sic) – the last drink that you had was at 1:30, which was four-and-a-half hours before you spoke to Detective D'Augostine; correct?

A. I had spoke to Detective D'Augostine at 2. I started speaking to him at 2 o'clock. He was at my house. He's the one who knocked on my door.

Q. Sir, I'm referring to the discussion you had with him at the Vineland Police Department where you signed the *Miranda* card at 6:04 a.m. Do you remember talking to him then?

A. Yes.

Q. All right. So my question, sir, is that: Isn't it true the last drink you had at 1:30 a.m. was approximately four-and-a-half hours before you spoke with him at the Vineland Police Department at 6:04 a.m.?

A. I didn't have a watch, but that's true. time it was.

Q. Okay; so your answer is yes?

A. Yes, but I didn't know what time it was.

Q. Sir, did you ever hear of the –

What high school did you go to?

A. Vineland.

Q. And when you were at Vineland High School were you a [p. 87] member of STAB?

A. Excuse me?

Q. Were you a member of STAB?

A. I never heard of it.

Q. Did you ever hear of Students United Against Blacks?

A. No.

Q. No, you're not a member of that?

A. No, sir, I don't remember any group like that.

Q. Okay. And, sir, we've heard testimony today that the purple door was what caught your eye and that's why you fired at the door there?

A. I just – I just was rioting. And glass and the purple door is what caught my eye, yes.

Q. Okay. And you just happened to have a .22 caliber Ruger rifle on you?

A. I picked that up at my house.

Q. Oh, I see, so you actually went home, picked up the rifle, and then drove by the Fowlkes residence; is that correct?

A. Yes.

Q. Did that rifle just happen to have some laser sights on it?

A. It had – contrary to the report, it had a laser sight, but there was no laser beam. It was a red-dot sight. It had nothing to do with a laser.

[p. 88] Q. Well, if you could explain that to us, sir, about the sight?

A. Okay. In – well, do you know – I'm sure most people know what a – a regular scope is, right, with the cross hairs, –

Q. Right.

A. – to make sure you're hitting your target?

Q. Uh-huh.

A. Well, a laser sight has no magnification to it. It's zero magnification. But you aim – when you're aiming, instead of looking through the back and the front sights you look at a red dot. You place the red dot where – approximately where you want to hit and you pull the trigger.

Q. Okay. And it's true that that sight increases accuracy; correct?

A. No, it's more like a – it was more like a toy. A scope would increase accuracy a lot more than a red-dot sight.

Q. You consider the laser sight a toy, sir, when attached to that .22 caliber?

A. Comparing to – comparing to target shooting or anything serious, yes, –

Q. Sir, my –

A. – it was just a sight.

Q. – question is: You consider the laser sight to be a toy?

[p. 89] A. That's what I consider it, yes.

Q. Did you also consider the silencer, which is attached to that rifle, to be a toy, –

A. Yes.

Q. – as well? Those are toys?

A. It was just an experiment.

Q. An experiment in what, sir?

A. Well, I had – I had a lot of horses next door, my next door neighbor's. And I didn't want to spook – spook the horses.

Q. Oh, I see, so –

A. I just wanted to see – I just wanted to see what I could do. I just – it was like a hobby, an obsession. I wanted to see what I could make, that's all.

Q. So you had the silencer on the gun because you didn't want to wake up any horses; is that your testimony?

A. Well, not at 2 o'clock in the morning, but –

MR. O'NEILL: He said "spook," Judge.

THE WITNESS: It was – it was there.

THE COURT: "Spook" is the term.

CROSS-EXAMINATION BY MR. LUTHER:

Q. You didn't want to spook any horses?

A. Spook the horses or to get my neighbors upset, yeah, 'cause I – I shot – just target shooting out – out in my backyard.

[p. 90] Q. Well, that silencer was on the rifle when you fired at the home on December 22nd; wasn't it, sir?

A. Yes, I just left it on, yeah.

Q. Wasn't it true that you didn't want to be caught and that's why you had the silencer on?

A. No, sir.

Q. No?

A. No, sir, –

Q. Okay.

A. – it had nothing to do with it.

Q. It just happened to be on there?

A. Yes, sir.

Q. Okay. Sir, you were aware, were you not, that the Fowlkes had moved into your neighborhood at some point in 1994?

A. Were – were I aware that they moved in July; is that what you said?

Q. At some point in 1994 were you aware that they had moved into the neighborhood?

A. No.

Q. Okay. Sir, do you remember talking with Detective D'Augostine on December 22nd, 1994?

A. Yes.

Q. Okay. Did you tell him that you did not personally know the Fowlkes or their family, but because they are black in color you did not want them in the neighborhood? Did you tell [p. 91] him that, sir?

A. I believe I said something like that but, again, it wasn't true.

Q. So you lied to the detective?

A. Yes.

Q. And that's because you thought it was in your best interest at that time to lie?

A. It was – it was a scare tactic. It was – it was in response to the way he was pressuring me.

Q. Sir, you've just admitted that you lied to the detective. And my question to you is: Did you lie to the detective because you thought it would be in your best interest to do so?

A. Yes.

Q. Okay. Sir, do you think it's in your best interest today to tell Judge Ridgway that you are not a racist?

A. Yes.

Q. Okay. And do you also –

A. And it's also true.

Q. – do you also admit, sir, that it's in your best interest today to tell Judge Ridgway that you were not

racially motivated when you fired those shots at the Fowlkes home?

A. I am not under the influence of alcohol or drugs today, and I am under oath. That's why I'm telling the truth today.

Q. Sir, now that you've said that would you please [p. 92] answer my question?

A. Yes, sir.

Q. My question was –

A. What was it again?

Q. – my question was: Don't you agree that it's in your best interest today, sir, to tell Judge Ridgway that you were not racially motivated when you fired those shots at the Fowlkes residence?

A. Yes.

Q. Okay. Sir, did you ever tell Detective D'Augostine that you knew there were black people at that residence because you had seen them outside in the yard?

A. I don't remember ever saying that, no.

Q. Sir, were you in court this morning when your attorney stipulated that you said that to Detective D'Augostine?

A. You're losing me.

Q. Do you know what "stipulation" means?

A. Is it stated or whatever?

Q. To agree.

A. To agree?

Q. Were you in court this morning sitting next to your attorney when your attorney agreed that you told Detective D'Augostine that you knew that black people lived at the residence because you had seen them outside in the yard?

[p. 93] MR. O'NEILL: I object to the form of the question. I don't believe that he can be cross-examined on the basis of what I said or may have said.

THE COURT: Oh, no, I disagree with you. If he (sic) makes a stipulation – if you make a stipulation on the record your client's bound by it. And supposedly (indiscernible – voice too low) agree to it.

MR. O'NEILL: Well, if Your Honor pleases, my recollection of what happened was that I offered to stipulate –

THE COURT: No. No. No. No, listen, Mr. –

MR. O'NEILL: – and then the sergeant testified.

THE COURT: – Mr. O'Neill, your objection's overruled.

Ask the question.

CROSS-EXAMINATION BY MR. LUTHER:

Q. All right. Mr. Apprendi, did you ever tell Detective D'Augostine on December 22nd of 1994 that you were just giving the Fowlkes a message that they were in your neighborhood?

A. I believe I said something like that, yes.

Q. Okay. For the record, although it's obvious, you're a white male?

A. Yes.

Q. Okay. And what race are the Fowlkes?

A. They're Afro-American.

[p. 94] Q. Okay. And you were aware of that before December 22nd of 1994; correct?

A. About the Fowlkes?

Q. Yeah.

A. No.

Q. When did you first learn that they were African Americans?

A. The morning of the 22nd, after Detective D'Augostine told me.

Q. I see. Sir, what's your – what was your address in December of 1994?

A. 4745 East Chestnut Avenue –

Q. Okay.

A. – in Vineland.

Q. And you're aware that the Fowlkes resided at 5211 East Chestnut Avenue in Vineland?

MR. O'NEILL: I have to object. He's already said that he didn't know –

THE WITNESS: The answer's no.

MR. O'NEILL: – that the Fowlkes were black or black people lived in that house.

THE WITNESS: The answer's no. I'll answer your question. The answer's no.

MR. LUTHER: Judge, that wasn't my question. My question was simply was he aware that the Fowlkes resided at [p. 95] 5211 East Chestnut Avenue.

THE WITNESS: I'll answer it again.

MR. LUTHER: I didn't ask anything

THE COURT: Just wait a minute.

MR. LUTHER: – about white or black.

THE COURT: Just wait a minute.

Do you understand the question?

THE WITNESS: Yes, I do.

THE COURT: What do you think the question asks?

THE WITNESS: The question is asking me if I were (sic) aware that the Fowlkes were in the house at 52 – I mean, were – had been residing at 5211 East Chestnut Avenue.

THE COURT: And what's your answer to that?

THE WITNESS: No.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, were you aware of any black families in your neighborhood in December of 1994?

A. I never – I knew there was a couple black families in the neighborhood, but I never paid that much attention to it, 'cause it didn't matter.

Q. You never paid that much attention to them?

A. No, except –

Q. Well, how –

A. – except for knowing that – that one house. I remember that one house.

[p. 96] Q. – well, how about the Lakes that you testified to? You testified –

A. That was the house.

Q. Yeah, you said they had a green house with bricks and a wagon wheel and a Mexican on the front lawn. But I guess you –

A. Yes.

Q. – weren't paying too much attention?

A. I was then.

Q. Oh, you were paying attention?

A. At that time, yes.

Q. Okay. Were there any other black families that you were aware of in your neighborhood in December of 1994?

A. Not that I was aware of, no.

Q. Okay. So the only black family that you were aware of in December of 1994 in your neighborhood was the Lake family?

A. Yes.

Q. And where did they reside in relation to you?

A. It was on the – gee, I only saw the house a couple times. It was on the north side of Chestnut Avenue. I think it was – I can't remember whether it was further east or west to my house, but it wasn't too far.

Q. All right.

A. Like I said, I –

[p. 97] Q. Was it close to the –

A. – never paid that much attention.

Q. – Atlantic County border; do you know?

A. I don't know where the Atlantic County border is.

Q. Well, it's about a hundred yards from the house that you shot up. Does that refresh your recollection?

A. Yeah, but I don't know where it was in relation to that spot.

Q. Okay. Was it east or west of that spot; do you know?

A. I don't remember.

Q. All right. So your testimony under oath is that the family's home that you shot at just happened to be black and you had no idea at the time that they were black; correct?

A. That's correct.

Q. Okay. Sir, you've also testified that you took all kinds of drugs on the 21st and the 22nd; is that correct?

A. Yes.

Q. Did you ever tell Detective D'Augostine on December 22nd of 1994 that you took some medication because you had an upset stomach and bought the medication over the counter?

A. No, sir, I did not say that.

Q. So you didn't say that at all?

A. No, sir, never.

Q. Did you discuss your drinking with Detective D'Augostine on the morning of December 22nd, 1994?

[p. 98] A. Yes.

Q. Did you tell him that between 12:30 and 3:30 p.m. you had two drinks at the Windjammer?

A. I said three or four. I didn't say two.

Q. Okay. And did you tell him that on December 21 you went over to the Greek Island between 10:30 and 12 midnight – 10:30 p.m., that is – and had two drinks?

A. I didn't say two drinks.

Q. What did you say?

A. Three or – the same thing, about three or four, something like that.

Q. Okay. And what time did you tell him you left the Greek Island?

A. I was never asked that question. I didn't tell him any time.

Q. So you told him what time you left the Windjammer, but you didn't tell him what time you left the Greek Island?

A. Yes.

Q. Okay. And he didn't even ask? He wasn't – he didn't ask you?

A. I think I said something like a little while ago or something like that, but I didn't say any specific times, any reference to the time.

Q. Okay. So Detective D'Augostine made sure that he got the times about the Windjammer, but he didn't get the times [p. 99] about the Greek Island?

A. Well, I –

MR. O'NEILL: Objection.

THE WITNESS: – told –

MR. O'NEILL: Objection. He can't be asked –

THE WITNESS: It's ridiculous.

MR. O'NEILL: – what was in the mind of Detective D'Augogtine.

THE COURT: Sustained.

MR. LUTHER: I'll rephrase it, Judge.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Detective D'Augostine specifically asked you about the times you were at the Windjammer and you told him; correct?

A. I don't think it was a question directed by Detective D'Augostine. I just volunteered the information.

Q. But at some point if it wasn't Detective D'Augostine it was another Vineland Police officer. They asked you what times you were at the Windjammer on December 21, 1994; correct?

A. I never spoke to any other police officer, except for Detective D'Augostine.

Q. Sir, the previous answer you said it wasn't Detective D.'Augostine that you said that to. Who were you speaking with other than Detective D'Augostine?

MR. O'NEILL: Objection. He said he volunteered it. He said he didn't respond to a question.

[p. 100] THE COURT: All right. The question now is: Was there another police officer that you spoke to besides Detective D'Augostine?

THE WITNESS: Not more than like a couple words or something. I remember another officer saying that my trunk (sic) – I mean, my hood was warm, something like that. But I was – I was never asked any questions by any other police officer, except for Detective D'Augostine.

CROSS-EXAMINATION BY MR. LUTHER:

Q. And your testimony under oath today is that he mentioned homosexuals in jail and AIDS?

A. Yes, sir.

Q. And that he also told you that a large percentage of the prison is black; correct?

A. Yes.

Q. Okay. And that after he told you a large percentage of the prison is black, you then admitted that you did this crime because you wanted to scare the black people out of the neighborhood; is that correct?

A. Well, he added something else to that. He said that – he said that he did not – oh, I can't remember it now. He said he did not want to send me to jail. He wanted to get help for me. And if I cooperated with him and made his job easier, he would get help for me.

Q. How come you didn't remember that on direct exam, [p. 101] sir?

A. Excuse me?

Q. How come you could not recall that part of your testimony on direct exam?

MR. O'NEILL: Objection. He wasn't asked that question.

THE COURT: Sustained.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Isn't it true that you didn't mention that during your direct testimony, sir?

A. What direct? I don't understand. Direct.

Q. When Mr. – okay. When Mr. –

A. Direct?

Q. – O'Neill asked you questions you didn't mention that Detective D'Augostine told you he wanted to get you help; is that correct?

MR. O'NEILL: Objection, again. I didn't ask him that question.

MR. LUTHER: That's not my question.

My question, Judge, is whether or not he mentioned that during his direct.

THE COURT: Do you recall when Mr. –

Sit down, Mr. O'Neill.

When Mr. O'Neill was asking you the questions, do you recall whether or not you said anything about Detective [p. 102] D'Augostine wanting to get you help?

THE WITNESS: No, I forgot it.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Didn't you think that that was important, sir?

A. Yeah, I was – I had – I was trying –

Q. Sir, –

A. – to remember it. I knew I left something out, –

Q. – sir, –

A. – but this – it just now occurred to me.

Q. Okay. Are you aware that the State is moving for an extended term of imprisonment in this case?

A. Yes.

Q. And that the basis of that motion is that you acted with racial bias?

A. Yes.

Q. Didn't you think it was important to remember these threats that were made to you by the detective?

A. Yes, I knew it was important.

Q. But now you recall on cross-exam that those threats were made?

A. Just this second.

Q. Okay.

A. Just this second that I –

Q. Okay.

A. – left that out. It just came to me.

[p. 103] Q. All right. Anything else just come to you about what Detective D'Augostine said in the last few seconds?

A. Oh, I'm sure there was a lot of things he said in that – the four hours of interrogation, but nothing – nothing is as serious, I guess, or as pertinent to the case as the time that he threatened me.

Oh, he also – you know what? I did remember something. He told me –

Q. Oh, it's coming back?

A. What's that? Yeah.

Q. It's coming back now?

A. Yeah, –

Q. Good.

A. – he told me was going to take my silencer and stick it up my ass.

Q. Oh, I see. And, again, you agree that that was not on your direct exam?

A. Yes.

Q. Okay.

A. I'm a – I'm a little – very anxious and nervous. And I'm not thinking a hundred percent right now.

Q. Okay. Sir, did you tell Detective D'Augostine on December 22nd of 1994 that you were not under the influence of any alcohol or anything, and was only tired and requested some coffee, which was then given to you?

[p. 104] A. No.

Q. You never said that?

A. I said the – the coffee. Yes, I said the coffee. But I'm answering no to the entire question.

Q. Did you ever tell him that you were not under the influence of alcohol?

A. No.

Q. Did you ever tell him you were not under the influence of drugs?

A. No. That's the part I'm saying no to.

Q. Okay. Sir, you admitted in your direct examination that you didn't think the State would be able to use any of what you told Detective D'Augostine against you; isn't that true?

A. I was under that impression, yes.

Q. And you've learned now that that's not correct; isn't that true?

A. Yes.

Q. Sir, you also had two bombs in the house?

MR. O'NEILL: I object. This is far afield from where we're going for the purpose of this hearing, Judge.

THE COURT: Well, I'll see where it's going.

The objection's overruled.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, what were you going to do with those bombs?

[p. 105] A. I was just going to blow them up my field. That's what I told Detective D'Augostine.

Q. And –

A. Again, it was a mechanical process. I wanted to see if – if I could do – if I could (tape malfunction) them, that's all. It was never meant to hurt anybody with them.

Q. I see. And you put silencers on guns so you don't spook horses; correct?

A. Yeah.

Q. Now, sir, –

A. Well, yeah.

Q. Okay.

A. Yes, that's correct.

Q. Sir, let me see if I can understand this. Could you explain to this Court again why did you fire at the Fowlkes residence on two occasions in 1994?

A. I only remember one occasion. That was because of the door and the glass panel in the door.

Q. Okay. Sir, when you told Judge Ridgway under oath that you fired at the home on two occasions were you lying?

A. I just looked at the – at the evidence and figured I couldn't do any better, so I – 'cause I didn't remember specifically I said that – I agreed with the two incidents.

Q. So, in other words, you lied?

A. I thought I had no choice.

[p. 106] Q. So you lied under oath to Judge Ridgway when you told him that you fired at the home on two occasions?

MR. O'NEILL: Objection. That's not at all what he said, Judge.

THE COURT: Sustained.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, you remember firing at the home on December 22nd of 1994; is that correct?

A. Yes.

Q. Okay. And to help you remember is the fact that the police were at your home 15 of 20 minutes later; correct? Did that aid you in your recall?

A. Well, the exact timeframe I'm not sure. It was something like that, though.

Q. Okay. And are you telling us today under oath that you don't remember firing at the Fowlkes residence at any other time in 1994?

A. That's correct.

Q. Okay. When you told Judge Ridgway under oath back in July that you had fired at the Fowlkes residence on two occasions was that the truth?

A. Could you repeat that?

Q. All right. When you told Judge Ridgway under oath in July of this year that you had fired at the Fowlkes residence on two different occasions was that the truth?

[p. 107] A. Did I – did I tell him, is that what you're saying, under oath?

Q. Sir, we know that you did tell Judge Ridgway that under oath; –

A. Yeah.

Q. – okay? Do you remember pleading guilty?

A. Yes.

Q. Okay; that was back on July 24th of this year; correct, sir?

A. Yes.

Q. All right. Did you tell Judge Ridgway that you fired at the Fowlkes residence on two separate occasions in 1994?

A. Well, that was part of the plea agreement.

Q. Do you understand my question, sir?

A. No.

Q. All right. My question is very simple. I just want to know if when you pled guilty you told Judge Ridgway that you fired at the Fowlkes residence on two separate occasions in 1994. Is that what you told Judge Ridgway under oath?

MR. O'NEILL: Judge, I'm going to object, because this is not a test of his credibility. The record speaks for itself. The man admitted on two occasions committing the crimes of unlawful use of a weapon for an unlawful purpose. Now, if he says, as he's already testified, that he didn't remember shooting on a previous occasion but pleaded guilty [p. 108] because that's what the evidence showed, it's not a credibility question. And for that reason the question raised by the Prosecutor's objectionable.

THE COURT: Overruled.

MR. LUTHER: Judge, it goes directly to credibility.

THE COURT: Overruled. Overruled.

Ask the question and let the witness answer it.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, I'll ask you again. Did you tell Judge Ridgway when you pled guilty that you fired at the Fowlkes residence on two separate occasions in 1994?

A. Yes.

Q. Was that the truth?

A. That I did – that I did definitely –

Q. Yes or no, sir.

A. – do the two –

Q. Was that the truth?

A. I was going from the evidence.

Q. Yes or no, sir, was that the truth?

A. No.

Q. So you lied under oath to Judge Ridgway, but today you're telling us the truth?

THE COURT: Just wait a minute, Mr. Luther.

Do you have an answer to that question? Are you admitting that you lied under oath in July?

[p. 109] THE WITNESS: Can I explain it, Your Honor?

THE COURT: Well, why don't you answer the question, if you can, yes or no. And then you can explain it.

Did you lie under oath?

THE WITNESS: That I definitely did it, yes.

THE COURT: All right. Now explain to me what happened.

THE WITNESS: I – it was a really – a quick thing. I only had a few minutes before – on July 24th. I didn't know what the plea – what the final part of the plea bargain was. I wasn't given time to think about it. I was afraid because I was told that I could have been subjected to a-hundred – I think it was a-hundred-and-twenty years in prison, and eight – eight-hundred-and-some thousand dollars worth of fines. And I – I was under the impression that this – the other shooting was being – it was still under negotiation for the last couple months. And I was scared and I didn't want to put my family through a – through a trial. So I agreed to the plea bargain.

THE COURT: So for all of those reasons when you said that you fired twice it was not the truth?

THE WITNESS: Two separate occasions?

THE COURT: Yes.

THE WITNESS: Yes.

THE COURT: All right, Mr. Luther, go ahead.

MR. LUTHER: Thank you, Judge.

[p. 110] CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, isn't it true that you were arrested on December 22 of 1994 –

A. Yes.

Q. – and charged with four different shootings; correct?

A. Yes.

MR. O'NEILL: Objection. Those other shootings are irrelevant to this procedure, Judge.

MR. LUTHER: Judge, I'm going to his memory, to his recall, to his credibility. The Court certainly –

THE COURT: At this point it's –

MR. O'NEILL: It's irrelevant, Judge.

THE COURT: – overruled. The objection's overruled

Go ahead.

MR. LUTHER: Thank you.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, you were given those charges dealing with the four different shootings on December 22 of 1994; were you not?

A. Four different –

Q. Four separate –

A. – dates, you mean?

Q. Yeah, you were charged with –

A. Or shooting a number of shots?

Q. – you were charged with shooting at the Fowlkes residence on four separate dates.

[p. 111] A. Yes.

Q. Do you remember that?

A. Yes.

Q. And you were given what's called the green sheet, your copy of the complaint, on those dates; correct?

A. Yes.

Q. Okay. So you knew back in December of 1994 that you were being charged with four separate shootings of the Fowlkes residence?

THE COURT: When you say "four separate," you mean shootings on four –

THE WITNESS: The four occasions.

THE COURT: – separate occasions?

MR. LUTHER: Yes. Yes, Judge.

THE WITNESS: Yes, I did.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Okay. And that those four separate occasions meant four different dates; correct?

A. Yes.

Q. Now, the plea offer that was made in this case, sir, you were always aware that the State (sic) – the plea offer required you to admit to two separate shootings; is that correct, sir?

A. Yes.

Q. And you were aware of that early in 1995; were you [p. 112] not?

A. Not the plea bargain.

Q. Well, the terms of the plea agreement which were extended to you, you knew what they were certainly long before July 24th of 1994; didn't you?

A. I knew what the preliminary plea bargain was about two months before July 24th.

Q. So you knew at least two months before you pled guilty that the State wanted you to admit to two of the four charged shootings; correct?

A. Yes.

Q. So you knew for that at least two-month period that that was the plea offer; correct?

A. I was under the impression that the other shooting was being negotiated.

Q. But you did know that the State wanted you to admit to two separate shootings?

A. Yes.

Q. Okay. Sir, since you admit you lied to Judge Ridgway on July 24, how do we know if you're not lying today?

A. 'Cause I'm not.

Q. So we're supposed to just rely on your word then, sir?

A. What else can I tell you? What else can I do?

Q. Well, sir, you've admitted committing perjury;

C. Apprendi, Jr. – Redirect

[p. 113] correct?

A. I just never –

MR. O'NEILL: He can't be asked –

A. – thought of it that way.

MR. O'NEILL: – a legal definition, Judge. He's not competent to answer that.

THE COURT: I don't know what more the witness can add, Mr. Luther, other than (indiscernible – voice too low).

MR. LUTHER: I have nothing further, Judge.

THE COURT: All right.

MR. O'NEILL: Well, I just have one question, Judge.

THE COURT: Go ahead.

REDIRECT EXAMINATION BY MR. O'NEILL:

Q. Charles, in reference to the September shooting, is it your testimony that you don't remember doing the shooting, or are you testifying that you lied to the Court and said you did it and you really didn't? Which is it?

A. I'm basing it on the same thing. I don't remember doing any other shooting.

MR. O'NEILL: No further questions.

RECROSS-EXAMINATION BY MR. LUTHER:

Q. So you could have done three prior shootings? You just don't remember?

MR. O'NEILL: Objection.

THE COURT: Sustained.

D. D'Augostine – Direct

[p. 114] MR. O'NEILL: It's not before the Court.

THE COURT: Sustained.

Anything else, Mr. Luther?

MR. LUTHER: No, Your Honor.

THE COURT: All right. You may step down.

THE WITNESS: Thank you.

THE COURT: Any other witnesses?

MR. O'NEILL: No, sir.

THE COURT: Any rebuttal witnesses?

MR. LUTHER: Yes, Your Honor. The State calls Dennis D'Augostine.

THE COURT: Is he still available?

MR. LUTHER: Yeah.

THE COURT: Come up here, Officer. You're still under oath.

Go ahead, Mr. Luther.

(Whereupon Det/Sgt. Dennis D'Augostine was reexamined, as follows:)

DET/SGT. DENNIS D'AUGOSTINE, WITNESS, SWORN
DIRECT EXAMINATION BY MR. LUTHER:

Q. Good morning (sic) – sir – or good afternoon, sir. Could you tell the Judge your name, please?

A. Dennis D'Augostine. I'm with the Vineland Police Department.

Q. And in what capacity?

[p. 115] A. I'm a detective/sergeant.

Q. And how long have you been so employed?

A. 26 years.

Q. Okay. And were you so employed on December 22 of 1994?

A. Yes, sir.

Q. And on that date did you have occasion to speak with a Charles Apprendi, Junior?

A. That's correct.

Q. And prior to speaking with him did you read him his *Miranda* rights?

A. Yes, I did.

Q. Did you ascertain that he under – strike that.

Did he indicate that he understood his *Miranda* warnings?

A. Yes, he indicated he clearly understood them. And he waived his *Miranda* warnings and he was – and wished to talk to us.

Q. Okay. And where – what time was the *Miranda* warning given to him at the Vineland Police Department?

A. Approximately 6:04 a.m.

Q. And that was December 22, 1994?

A. That's correct.

Q. And did you ask Mr. Apprendi, Junior, how much alcohol he had consumed on December 21 and December 22 of 1994?

[p. 116] A. Yes, I did.

Q. And what did he tell you?

A. He indicated he had two drinks at the Windjammer sometime in the afternoon. And from there he went over to the Greek Island around 10:30 and he had two more drinks. He also said he had some medications.

Q. Okay. Did he indicate approximately what time he left the Windjammer?

A. At approximately –

Q. I'm sorry. Strike that.

Did he indicate what time he left the Greek Island?

A. Yes, around 12 midnight.

Q. And did he indicate when he was at the Windjammer earlier that day?

A. Yeah, he told me between 12:30 p.m. and approximately 3:30 p.m.

Q. All right; okay. Did he indicate whether or not he knew that black people lived at the residence that he fired at?

A. Yes, he did.

MR. O'NEILL: Well, I'm going to object, Judge. I notice that the Detective/Sergeant is reading from his report. No foundation has been laid.

DIRECT EXAMINATION BY MR. LUTHER:

Q. Sir, do you need to refer to your report to refresh your recollection?

[p. 117] A. Yes, I do.

MR. O'NEILL: As to which question?

MR. LUTHER: Well, how about if I ask the question? And if he needs to refer to his report he can.

MR. O'NEILL: Well, that's why I objected.

THE COURT: Generally, do you need to refer to your report to refresh your recollection in your testimony – for your testimony?

THE WITNESS: For specific times I would, Your Honor.

THE COURT: All right. Go ahead. Let's see where we're going.

MR. LUTHER: Okay.

DIRECT EXAMINATION BY MR. LUTHER:

Q. Sir, did Mr. Apprendi, Junior, indicate to you whether or not he knew that black people lived at the residence that he shot at?

A. Yes, he did.

Q. And what did he tell you in that regard?

A. He told me that he knew that black people lived there. And I asked him, "How did you know?" And he – he told me he'd seen a black person outside in the yard.

Q. Okay. During the time that you spoke with Mr. Apprendi that morning at the Vineland Police Department, did he make any statement to you whether or not he was under the influence of any alcohol?

[p. 118] A. Yes, he did.

Q. What did he tell you?

A. He told me he wasn't under the influence of any alcohol or anything, he said.

Q. Okay. Do you have any experience recognizing people who are intoxicated?

A. Yes, I do.

Q. And where is that from?

A. I was in Patrol Division for approximately 12 years.

Q. Okay.

A. And I –

Q. Did Mr. Apprendi appear to be intoxicated to you, sir?

A. No, I didn't smell any alcohol on his breath. His eyes weren't bloodshot. No alcohol on his person. He didn't sway. And he answered my questions clearly.

Q. Okay. Do you have any experience in recognizing whether or not people are under the influence of narcotics?

A. Yes, I do.

Q. And could you tell the Court about that?

A. I've been involved with narcotics. I've been involved with hundreds of cases of narcotic investigations. I was a supervisor of the Cumberland County Narcotics Unit. And I – I attended drug enforcement administration schools, workshops and seminars throughout my career.

[p. 119] Q. Okay.

A. And I can recognize if someone's under the influence. And I would – he was not under the influence of any drugs.

Q. All right.

A. He indicated he was on medication, but he told me what that was.

Q. Did he indicate where he obtained this medication?

A. He may have said – he said he purchased it over the counter and it was for his upset stomach.

Q. All right. Did he tell you what the name of that medication was or no?

A. I'd have to refresh. I don't believe he did, –

Q. All right.

A. – but I'm not sure.

Q. Did he ever tell you when you spoke with him that morning that that date or on the 21st of December he had taken Lomotil?

A. He may have. I don't – I don't remember.

Q. Okay. Would that have been with reference to the stomach medication?

A. Yes.

Q. All right. Did he – is it possible he told you what the name of the stomach medication was?

MR. O'NEILL: Objection. If it's "possible." He either did or he didn't.

[p. 120] THE COURT: Well, it's not Lomotil. He doesn't remember if it was Lomotil.

Do you remember if he – he told you the name –

THE WITNESS: I –

THE COURT: – of the drug?

THE WITNESS: – I don't – he may have, but I don't know –

THE COURT: All right.

THE WITNESS: – at this point.

THE COURT: You don't remember?

MR. LUTHER: All right.

THE WITNESS: I don't remember.

DIRECT EXAMINATION BY MR. LUTHER:

Q. All right. Detective, when you spoke with Mr. Apprendi did you tell him that there were lots of homosexuals in jail?

A. No, sir.

Q. Did you tell him that a lot of people in jail have AIDS?

A. No, sir.

Q. Did you tell him that a large percentage of the prison is black?

A. No, sir.

Q. Did you tell him that if he cooperated that you would make it easier on him?

[p. 121] A. No, sir.

Q. Did you tell him that you didn't want to see him go to jail, that you just wanted to get him help?

A. No, sir.

Q. And did you tell him that you wanted to take that silencer and shove it up his ass?

A. No, sir.

Q. Sir, where was the interview conducted at the Vineland Police Department with yourself and Mr. Apprendi, Junior?

A. It was the first interview room, which is adjacent to the detective bureau.

Q. And who was in that room with you and Mr. Apprendi, Junior?

A. Officer John Rizzo and myself and Mr. Apprendi.

Q. Okay. And, incidentally, do you see Mr. Apprendi in court today?

A. Yeah, he's sitting next – seated next to Attorney Joe O'Neill, to his right.

Q. Okay.

THE COURT: The record will reflect that he's identified the defendant.

DIRECT EXAMINATION BY MR. LUTHER:

Q. And when you were speaking with him did he seem coherent to you?

[p. 122] A. Yes, he answered clearly. And he – he wasn't under the influence of anything. He answered our questions clearly. And he was responsive to our – our questions.

Q. Were you able to ascertain what his educational background was during the interview?

A. Yes, he – he told me he was a pharmacist at Winslow's Drugstore in Vineland, West and Chestnut Avenue. And I believe he was a pharmacist for approximately ten years or more.

Q. Okay. During the course of the interview with Mr. Apprendi, Junior, did you mention to him that there

were a total of four shootings, four different shootings, on the Fowlkes residence?

A. Yes, I did.

MR. O'NEILL: It's irrelevant, Judge.

THE WITNESS: Huh.

THE COURT: Overruled.

MR. LUTHER: Thank you, Judge.

THE WITNESS: Yes, I did.

DIRECT EXAMINATION BY MR. LUTHER:

Q. And during the course of your interview how many shootings at that residence did Mr. Apprendi admit to?

MR. O'NEILL: Objectionable, Judge. That's not the purpose of this hearing. There's only been a plea of guilty to two. There's no reason to prove that again.

THE COURT: Well, let's ask him.

D. D'Augostine – Cross

[p. 123] Let me ask you this: Did he admit to you that he fired on more than one occasion at the Fowlkes residence?

THE WITNESS: Yes, Your Honor.

DIRECT EXAMINATION BY MR. LUTHER:

Q. How many occasions did he admit to you that he fired at the Fowlkes residence?

A. Two incidents.

Q. Two separate instances?

A. Two separate incidents.

Q. All right. And when did the interview with Mr. Apprendi terminate?

A. At some point during the interview he asked for an attorney. And when he did all questioning ceased.

Q. Okay. And is that the reason no taped statement was taken from Mr. Apprendi?

A. Yes, that's the reason.

Q. And your understanding of the law is that once someone requests an attorney all interrogation must cease; correct?

A. Yes, sir.

Q. All right.

MR. LUTHER: Nothing further, Judge.

THE COURT: Cross-examine.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. Sergeant, before this defendant was arrested on [p. 124] December 22 of 1994, Ms. Fowlkes, who lived in the house that was shot up, had voiced her opinion publicly that the shootings previous to the one of December 22 had been racially motivated; isn't that right?

A. I – I don't know that to be true. I –

Q. Well, if I told you that a report from one of your men dated November 14 of 1994 reveals that back on

November 10th of 1994, again before the date of the arrest, that Mattie Fowlkes stated her opinion that previous shootings at her house were racially motivated, would you agree or would –

THE COURT: Wait –

MR. O'NEILL: – you try to contradict that?

THE COURT: – a minute. Now, wait a minute, Mr. O'Neill. He said he didn't know that she had made – as I understand it –

THE WITNESS: Well, I don't know that.

THE COURT: – he didn't know –

MR. O'NEILL: Well, –

THE COURT: – if she had made such a complaint. Now you're asking him if it's in some other police officer's report?

MR. O'NEILL: Let me ask it another way then, Judge. I'll see if we can get at it a different way.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. As a sergeant you are a supervising officer; are you [p. 125] not?

A. Yes.

Q. Okay. There came a time when you reviewed all of the reports in this particular case; isn't that so?

A. Yes, sir.

Q. Including those of your other officers, as well as your own; right?

A. Yes, sir.

Q. Okay.

MR. O'NEILL: Now, may I have this marked as what would amount (sic) to D-2?

MR. LUTHER: Judge, I'm going to object. The foundation has to be laid whether or not the officer reviewed the report prior to December 22, 1994.

MR. O'NEILL: Well, –

THE COURT: Well, why don't you ask him that question, first of all?

MR. O'NEILL: All right.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. Do you remember when you first reviewed all of the reports concerning this case? You probably don't know what date, I guess; do you?

A. That would be that same day, probably, I reviewed it.

Q. Which same day?

A. December 22nd –

[p. 126] Q. Okay.

A. – or December 23rd.

Q. And as part of that review did you have occasion to look into a report dated November 14 to your own police department?

MR. O'NEILL: Can I show it to you?

THE WITNESS: Can you tell me the officer's name?

THE COURT: You want to have it marked? What is it, D-1?

MR. O'NEILL: D-2, because I think D-1 is the CV of Dr. Cooke.

THE COURT: Okay.

MR. O'NEILL: The only one (indiscernible – voice too low). Let's mark that, Judge. That CV I asked to be marked as an exhibit earlier.

THE COURT: So (indiscernible – voice too low) was not attached to the submissions you made to the Court? Did you submit the second one before (indiscernible – voice too low).

MR. O'NEILL: No, just the CV, Judge. I said that that should be marked and you agreed.

THE COURT: All right.

MR. O'NEILL: So if we could mark that as D-1 (indiscernible – voice too low).

CROSS-EXAMINATION BY MR. O'NEILL:

Q. Let me show you what has been marked as Defense [p. 127] Exhibit D-2 for identification, and ask you to look at it. That report is dated what?

A. November 14, '94.

Q. Okay. Can you read the name of the officer who made the report?

A. Detective Valentine.

Q. Okay.

MR. LUTHER: Judge, I'm going to ask the witness to – or object based on the fact that there's still no foundation as to whether or not this detective reviewed that prior or after speaking with Mr. Apprendi.

MR. O'NEILL: I don't know that it's relevant as to when he reviewed it, as long as at some point in time he reviewed it, Judge.

THE COURT: It makes a lot of difference, because the thrust of your (sic) position is – or your client's position is that Detective D'Augostine first mentioned to him the fact that the house that he shot at was occupied by black people. The detective has stated, as I understand it, that he didn't know that, or at least it was not the subject matter of a report by Ms. Fowlkes that he knew about before the time that he started questioning Mr. D'Augostine (sic) – or questioning Mr. Apprendi. Now, –

MR. O'NEILL: Oh, no, I didn't say that, Judge. I didn't say that he had to know that before he questioned Mr. [p. 128] Apprendi. My position is that at some point in time there was a revelation by Ms. Fowlkes that she believed that the prior shootings were racially motivated. Not the one on December 22, because we didn't know about that. This statement was taken by the officer, Detective Valentine, on the 14th of November.

MR. LUTHER: Your Honor, the witness has already answered he was unaware of those statements.

MR. O'NEILL: Well, no, the witness already answered that at some point in time he did review all of the reports. Not only his own, but also those of his men.

THE COURT: Well, the issue is when in time did he review the reports, before or after he started questioning Mr. Apprendi?

MR. O'NEILL: Well, let me try it a different way, Judge.

THE COURT: Well, let's just ask him.

As the supervising officer, you're responsible – whether you do it or don't – but you're responsible for reviewing the reports of your subordinate officers; are you not?

THE WITNESS: Well, I – it could be another supervisor also reviewing them. But to answer your question, Your Honor, it was after.

THE COURT: It was – what was after?

THE WITNESS: The – I – reading the reports was [p. 129] after the reports were done. And it was after the interview with –

THE COURT: With Mr. Apprendi?

THE WITNESS: – Mr. Apprendi.

THE COURT: Well, that makes sense chronologically –

THE WITNESS: Yes.

THE COURT: – as to when it would have taken place; right?

THE WITNESS: Yes. In this case I didn't review that – I mean, I read that report, but I didn't review it. It was Sergeant Codispoti.

THE COURT: All right.

MR. O'NEILL: Let me ask –

THE COURT: And when you read it, it would have been after your discussion or after your interview with Mr. Apprendi?

THE WITNESS: That's correct, Your Honor.

THE COURT: Doesn't that make sense, Mr. O'Neill?

MR. O'NEILL: Well, I'm not done yet, Judge. There's another place we have to go yet, if I may.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. The report –

THE COURT: Be my guest.

MR. O'NEILL: Pardon, Judge?

THE COURT: Be my guest.

[p. 130] MR. O'NEILL: Thank you, sir.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. The report from which you testified is dated what?

A. 12/23/94.

Q. That's the day after the arrest; isn't it?

A. Yes, sir.

Q. All right. Now, you testified earlier, Sergeant, that at some point in time you read all of the reports. Not only those that you made, but those of your men, as well; is that right? You said that earlier in response to my question.

A. Yeah, at some point in time I read all the reports, –

Q. Okay.

A. – yes.

Q. So you can't state when it was that you read any of the other reports, I guess; can you? It would be asking too much.

A. No, I know it was after the investigation. And then, of course, for court preparation I read them.

Q. Okay. But you can't say what date it was –

A. No.

Q. – that you read these other –

A. No.

Q. – reports? Okay.

Do you remember reading the report of Detective Valentine as to what Ms. Fowlkes told him about the racial [p. 131] motivation involved in the previous shootings?

A. I remember something was mentioned, yes.

Q. All right. So before this defendant was charged with racially-motivated crimes – not necessarily you, but

at least some people in the Vineland Police Department – knew that there was an allegation by Ms. Fowlkes before the date of this arrest that the previous shootings were racially motivated; isn't that so?

A. Well, I – I wouldn't have known that.

Q. Well, I didn't ask you that. What I asked you simply was this. Maybe I can say it in a different way.

A. According to the reports, yes.

Q. Okay.

A. According to Valentine's reports.

Q. All right. Did you ask or one of your men ask Ms. Fowlkes whether there are other blacks in the neighborhood besides her family?

A. I don't know that.

Q. Did you ask her that?

A. No, sir. In fact, I never spoke to her.

Q. Did you ask one of your men to ask her that question, as to whether there are other blacks in the neighborhood than the Fowlkes family?

A. No, I did not.

Q. Looking back and recognizing it as hindsight – now, [p. 132] I'm not holding you to that – recognize (sic) it is hindsight, don't you agree it would be important to learn if there are other blacks in the neighborhood? And if there were, whether they were the subject of shooting attacks?

MR. LUTHER: Argumentative, Your Honor.

THE COURT: Sustained.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. Did Ms. Fowlkes tell you or any of your men that she, Ms. Fowlkes, worked in a Vineland State School house in the neighborhood of where the shooting occurred where she lived?

A. She may have. I don't know that.

Q. All right. And there was no, to your knowledge, investigation conducted to determine if this was the only – these are the only black people in the neighborhood; is that right?

MR. LUTHER: Judge, objection. He's way beyond the scope of the direct examination. He's –

MR. O'NEILL: Well, the whole purpose is racial –

THE COURT: I'll –

MR. O'NEILL: – bias here.

THE COURT: – overrule the objection.

Go ahead.

MR. O'NEILL: All right.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. Do you remember the question, sir?

[p. 133] A. This – this investigation was over a period of three – three or four months. And during that

period of time I had no involvement with this incident, except for on December 22nd. As to what the patrol officers did during that time period, I can only testify to the reports. I – I wasn't supervising the case from the – from the beginning.

Q. You didn't know about the previous investigation until after you at some –

A. Until I was –

Q. – time read the reports?

A. – until I was called in –

Q. Okay.

A. – on December 22nd.

Q. Very well, sir.

A. Okay.

MR. O'NEILL: I have no further questions. Thank you, Judge.

THE COURT: Mr. Luther, any redirect?

MR. LUTHER: Just briefly, Judge.

REDIRECT EXAMINATION BY MR. LUTHER:

Q. Detective, did you charge this defendant with racial bias harassment after you interviewed him?

A. Yes, sir.

Q. And did he tell you that the reasons for this crime were racially motivated?

[p. 134] A. Yes.

MR. O'NEILL: It's asked and answered, Judge. Been over that –

THE COURT: Sustained.

MR. O'NEILL: – on direct.

MR. LUTHER: Judge, it just goes to why – well, –

THE COURT: It's been asked and answered a number of times.

MR. LUTHER: All right. Nothing further, Judge.

THE COURT: You may step down. Thank you.

Any other witnesses?

MR. LUTHER: Not at this time. I'd like to call the Fowlkes at the sentencing date.

THE COURT: Anything else at this time, Mr. O'Neill?

MR. O'NEILL: No, Judge.

THE COURT: Okay; all right. We'll adjourn these proceedings until the – 10 o'clock on the 15th.

MR. LUTHER: 10 o'clock, Judge?

THE COURT: 10 o'clock on the 15th.

MR. LUTHER: Thank you.

(Whereupon the hearing concluded at this time)

CERTIFICATION

I, CAROL H. VENDZULES, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the Superior Court on September 5, 1995, Tape No. 17077(1), Index No. from 2650 to 7370, Tape No. 17077(2), Index No. from 0000 to 6741, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings according to the best of my ability and knowledge.

Signature /s/ Carol H. Vendzules
CAROL H. VENDZULES
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DATED: 1/3/96